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1931.

THE

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Probate Division.

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AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL:

ALSO DECISIONS IN THE

ECCLESIASTICAL COURTS.

EDITOR—RIGHT HON. SIR FREDERICK POLLOCK, BART., K.C.

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1931.

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1931.

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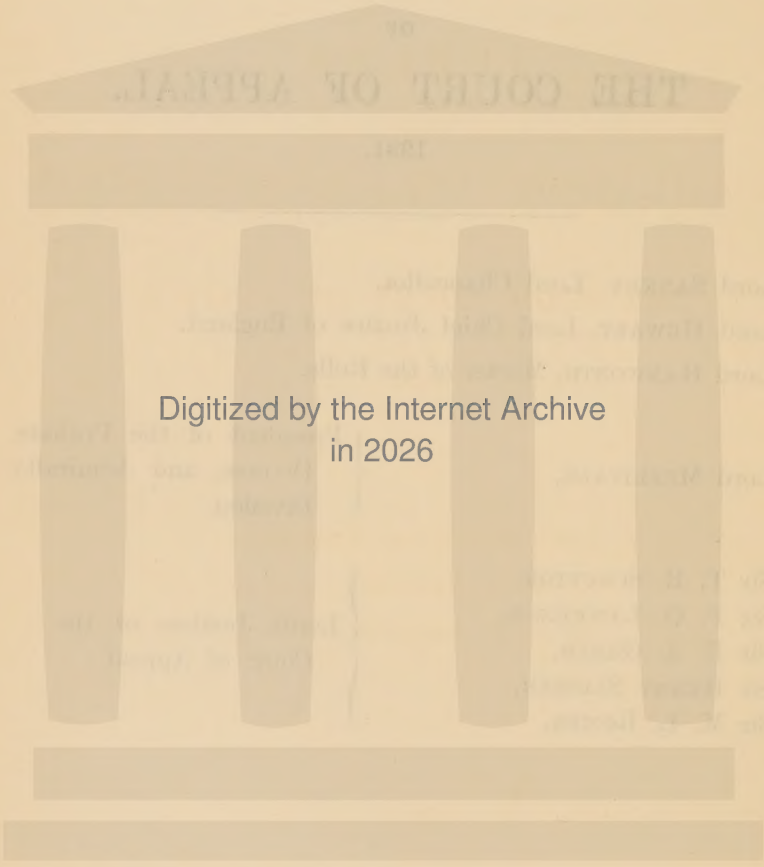

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JUDGES

OF THE

PROBATE, DIVORCE AND ADMIRALTY DIVISION

OF

THE HIGH COURT OF JUSTICE.

1931.

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CASES

DETERMINED BY THE

PROBATE, DIVORCE AND ADMIRALTY DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THAT DIVISION

AND BY THE

ECCLESIASTICAL COURTS.

SHEARN *v.* SHEARN.

1930
May 29;
June 6;
July 14.

Divorce—Permanent Maintenance—Security—"Liberty to apply" as to Security—Principles of Security—Right of Wife—Means of Husband—Relative Considerations applicable to Orders to secure and Orders to pay Maintenance—Supreme Court of Judicature (Consolidation) Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *ss.* 187, 190, *sub-ss.* 1, 2—*Administration of Justice Act,* 1920 (10 *&* 11 *Geo.* 5, *c.* 81), *ss.* 10, 12.

Applied. BARKER *v.* BARKER [1952] P. 184

The Court has no power to reserve liberty to apply for security in making an order for maintenance under the Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49), s. 190, sub-ss. 1, 2, on a decree for divorce. The insertion of such a provision would permit the conversion at a subsequent date of an order to pay maintenance into an order to secure it, and this is ultra vires of the statute.

In considering the question of security which must thus be ordered in the first instance, if at all, the interests of both spouses are to be considered. The maintenance ordered will be secured as far as circumstances permit, but in cases where the nature of the means of the husband renders it impossible to secure the whole maintenance proper to be ordered, the question arises whether it is in the interest of the wife to order security of a part, as compulsion of the husband to realize or transfer assets in order to give security under sub-s. 1 may hamper him

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in earning the income out of which he may be ordered to make payments under sub-s. 2. The wife has no greater inherent right to security than to an order for payment simply. Her right is to present maintenance, and if the property of the husband produces no present income or if an order for security would for any reason, such as the husband's absence from the jurisdiction, be unenforceable, it is more in the wife's interest that an order for payments should be made than an order to secure.

Quaere whether an order to secure a lump sum can be enforced under the Administration of Justice Act, 1920 (10 & 11 *Geo.* 5, *c.* 81), *ss.* 10, 12.

CROSS-APPEALS from registrar's order for permanent maintenance.

The order was for the payment of 740*l.* per annum free of tax with liberty to apply as to security and as to maintenance for the child of the marriage.

The petitioning wife asked by her appeal summons that the maintenance should be increased to 850*l.* per annum free of tax, that the respondent should be ordered to give security or alternatively that the respondent should secure to the petitioner one-third of his capital or that he should be ordered to realize and settle such a sum out of his assets as the Court should think fit and that maintenance should be ordered for the child. The respondent by his appeal summons asked that the amount of maintenance ordered should be reduced to 708*l.* less tax and that liberty to apply as to security should be deleted from the order.

The decree nisi was pronounced on April 11, 1929, and was made absolute on October 21, 1929. The only child was a boy born in August, 1924. The petitioner filed her petition for maintenance on July 15, 1929.

The summonses were adjourned into Court for argument.

The husband practised as a solicitor in the Malay States and thereby earned the whole of his present income, roughly taken at 2388*l.* He had also a number of shares in companies domiciled in Malay which paid no dividend, some policies of trifling surrender value and a reversionary interest in a capital sum of 6000*l.*, the youngest of several tenants for life being sixty years of age. The reversion had no present value. It did not appear that the petitioner had any means.

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SHEARN v. SHEARN.

Thomas Bucknill for the petitioner.

Noel Middleton for the respondent.

[It was agreed in the course of argument that any order for security must be made, if at all, in the first instance and could not be dealt with by giving liberty to apply for it. Discussion of this point is therefore omitted from this report. See the reasoning on the point in the judgment. The rest of the argument turned on the nature of the property of the respondent available and the quantum of the order, and the cases referred to are dealt with in the judgment.]

Cur. adv. vult.

July 14. HILL J. In this case I have to deal with cross-appeals from an order as to maintenance. The registrar ordered the husband to pay 740*l.* per annum free of tax and embodied in his order liberty to apply as to security and as to maintenance. Both husband and wife object to the amount. The wife further asks that an order as to security should be made. Counsel agreed that it was not within the power of the Court to embody in an order liberty to apply as to security. Under s. 190 of the Supreme Court of Judicature (Consolidation) Act, 1925, the power of the Court must be exercised " on " the decree for divorce. The cases have shown that some latitude is allowed in determining whether the application is made " on the decree " : *Scott* v. *Scott* (1) ; *Legge* v. *Legge*. (2) But when the application is made the Court must deal with it, and cannot reserve to itself power to deal with it hereafter. In my opinion counsel were right. The law as to maintenance is in an odd state. As embodied in the Supreme Court of Judicature (Consolidation) Act, it is the result of piecemeal legislation. Sect. 190, sub-s. 1, of that Act reproduces the law as to securing maintenance as enacted in 1857 (20 & 21 Vict. c. 85, s. 32) and repeated in 1907 (7 Edw. 7, c. 12, s. 1, sub-s. 1). Sect. 190, sub-s. 2, of the Supreme Court of Judicature (Consolidation) Act, 1925, gathers up the enactments of 1857, 1866 (29 & 30 Vict. c. 32), and 1907 as to periodical payments. There is a

(1) [1921] P. 107.

(2) (1928) 45 Times L. R. 157.

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Hill J.

further provision as to periodical payments in s. 196 of the Supreme Court of Judicature (Consolidation) Act which repeats 47 & 48 Vict. c. 68, s. 4.

The result is as follows: The wife "on the decree" may apply for security or payment or both. On such an application (*a*) the Court may order the husband to secure to the wife a gross sum of money or annual sum of money for any term, not exceeding her life; (*b*) in addition to or instead of an order to secure, the Court may order the husband to pay to the wife during joint lives a monthly or weekly sum, and may from time to time modify that order to pay, as provided in s. 190, sub-s. 2, and s. 196 of the Act of 1925. But the Court has no power to modify an order to secure, nor has it power in modifying an order to pay to turn it into an order to secure. The two orders are essentially different. The order under s. 190, sub-s. 1, is not an order to make periodical payments and secure the payments: it is an order to secure and nothing else. Under it the only obligation of the husband is to provide the security; having done that, he is under no further liability. He enters into no covenant to pay and never becomes a debtor in respect of the payments. The wife has the benefit of the security and must look to it alone; if it ceases to yield the expected income she cannot call upon the husband to make good the deficiency. This is made clear by the judgments in *Smith* v. *Smith* (1) and *Medley* v. *Medley*. (2) The order under sub-s. 2 is not an order to secure—it is an order to make periodical payments. There is no power under sub-s. 2 to order that these payments be secured. If the husband's means increase, the periodical payments can be increased. But however much his ability to secure increases, he cannot under sub-s. 2 be ordered to secure.

The limits of the powers of the Court under s. 190 become all the more marked when contrasted with the power under s. 187 of the same Act in cases of restitution of conjugal rights. In such cases the order may be made "at any time," not merely "on the decree," and the Court may order

(1) [1923] P. 191. (2) (1882) 7 P. D. 122.

periodical payments and order them to be secured, and may vary the payments and the deed: *Hooper* v. *Hooper*. (1)

By his order the registrar has tried to preserve to the Court the power hereafter to turn the order to pay into an order to secure. But that cannot be done. The liberty to apply must be omitted from the order. As to security it is ultra vires; as to periodical payments it is unnecessary.

The next question is whether the husband ought now to be ordered to provide security under sub-s. 1. It is not suggested that he can secure anything like the full amount of maintenance which ought to be provided. But it is said that he ought to secure part of it.

The advantage to the wife of an order to secure is two-fold. The benefit continues for her life and not merely during joint lives. The benefit is made safe, though the husband parts with the rest of his assets and ceases to earn an income. On the other hand the real interests of both wife and husband have to be considered. As was said by Warrington L.J. in *Hulton* v. *Hulton* (2), the Court has to decide "by what means, looking at the interests not only of the wife but of the husband as well, the payment of the sum so allowed ought to be secured." Of course, as sub-s. 1 directs, regard must be paid (inter alia) to the ability of the husband. As regards the wife the object of the whole procedure is to provide maintenance from the time she has divorced her husband. The Court will naturally desire to make the maintenance as secure as possible, and in cases where it can properly be done the Court will order a husband who is possessed of ample free capital to appropriate a sufficient part of it to secure the whole of the maintenance. In many cases that cannot be done, because the husband's capital, though ample, is yet not realizable, and not readily chargeable or transferable, and in all cases where it is impossible to secure the whole, it has always to be considered whether it is in the wife's interest to order part to be secured; it may be that to compel the husband to realize or transfer his assets in order to secure under sub-s. 1 will hamper him in earning the

(1) [1919] P. 153. (2) [1916] P. 57, 63.

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Hill J.

income out of which he is to make the payments under sub-s. 2. The matter has to be considered from all these points of view. It is entirely in the discretion of the Court. Historically, no doubt, the order to secure preceded the order to pay, and, as appears from the preamble to the Act of 1866, the power to provide periodical payments was enacted to meet cases where the husband had no ability to secure. But, to-day, in the Judicature Act, 1925, the two powers are conferred by the same section, and the wife has no greater right to an order to secure than she has to an order to pay.

In the present case the husband earns his living as a solicitor in the Federated Malay States. The whole of his present income is earned income. The amount of the maintenance has been based upon his earnings. He has a share in a rubber plantation and shares in a number of companies. The plantation is in the Malay States. None of the companies are registered in England, and I think they are all in the Malay States. According to the husband's affidavit, from the rubber plantation there is no income and none is expected for several years ; he says the same of all the companies. He gives the capital value of his share in the plantation as 2267*l.* and of the shares as 4290*l.*: and says that the whole is charged to the Bank to secure a sum of 850*l.*

In addition he has some policies of trifling surrender value. Finally he has a reversionary interest in 6000*l.* part of his grandfather's estate, contingent on his surviving various tenants for life, of whom the youngest is about sixty years of age. He says that this reversionary interest is of no present value. Counsel for the wife asks that the husband be ordered to provide a lump sum of 3000*l.* to be settled or to settle one-third of the whole of the above assets, including the reversionary interest. If the order is to be for a lump sum, the husband must realize his assets. The only realizable assets are the share in the plantation and the shares in the companies. It is within the power of the Court to make such an order, but I have to consider whether the Court could enforce such an order. Assuming that I do order the husband to provide a lump sum of 3000*l.* so as to provide

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an annual sum of 140*l.*, then I must reduce the order to pay pro tanto and the order to pay will be (assuming the total to be 740*l.*) for 600*l.* If I do not see my way to order the husband to provide a lump sum, I can order him to settle one-third of his assets, subject always to the question whether the Court could enforce that order; but if I make that order, what sum by way of income is to be secured by it? I must fix some sum and reduce the order to pay pro tanto. The plantation and shares in the companies yield no income and may yield no income for years, and the reversionary interest may never yield any income. The object is to provide present maintenance for the wife. How can I attain that object by ordering the husband to secure the payment of a given sum per annum by a charge upon the shares in the plantation or the shares in the companies or the reversionary interest?

It cannot be done.

I return therefore to the suggestion that the husband should be ordered to provide a lump sum of 3000*l.*, and I have to consider how that could be enforced. The husband resides in the Malay States; his assets are all in the Malay States. This Court cannot get at his assets. It could attach him for disobedience to its order when he comes to this country: *Medley* v. *Medley* (1); and he has said that he comes to this country once every three years for his health, but he could easily take his holiday in some part of Europe other than England. If he was minded to disregard the order to provide the lump sum, he could easily do so. And meantime the wife would be without the income to be secured by the provision of 3000*l.* It was argued that an order to secure a lump sum could be enforced in the Malay States under the Administration of Justice Act, 1920 (10 & 11 Geo. 5, c. 81), ss. 10, 12. In my opinion, that is, at least, very doubtful. The Act (ss. 10 and 12) applies only to judgments or orders whereby any sum of money is made payable, and applies only to judgment creditors and judgment debtors. As at present advised, and having regard to the terms of the

(1) 7 P. D. 122.

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Supreme Court of Judicature (Consolidation) Act, s. 190, sub-s. 1, and the judgments in *Medley* v. *Medley* (1) and *Smith* v. *Smith* (2), I do not think the Act applies to an order to secure under sub-s. 1. If I am wrong in this view an attempt by the wife to enforce such an order in the Malay States would probably land her in costly and prolonged litigation.

On the other hand, there can be no doubt that an order to make periodical payments is an order which, as the payments fall due, can be enforced in the Malay States, under the Administration of Justice Act, 1920.

Looking at the matter all round, I think it is in the interests of the wife that the order now made should be an order for periodical payments and not an order to secure. I think she is more likely to receive the desired maintenance. It is certainly also in the interest of the husband, who would otherwise be driven to a forced sale of securities which may hereafter increase in value and begin to yield an income. If they do, and the means of the husband are thereby increased, the wife will be able to apply for an increase in the periodical payments.

A number of cases were cited in argument besides those I have referred to. I have considered them, but I do not think they help. *Tangye* v. *Tangye* (3) and *Shorthouse* v. *Shorthouse* (4) were cited by counsel for the wife in support of the proposition that I could order one-third of the husband's property to be secured to the wife. In each of these cases the husband was ordered to secure so much per annum. He had existing available assets sufficient to secure the whole of the maintenance. In *Shorthouse* v. *Shorthouse* (4) the question was how much of the husband's total capital should be set aside to secure 268*l.* per annum. He had a capital of 21,500*l.* and the order was to secure one-third of it. In *Tangye* v. *Tangye* (3) the husband had Preference and Ordinary shares in a company; the amount of them is not stated; he was ordered to secure 760*l.* per annum upon

(1) 7 P. D. 122.
(2) [1923] P. 191.
(3) [1914] P. 201.
(4) (1898) 78 L. T. 687; 79 L. T. 366.

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one-third of them; presumably one-third was the amount necessary to secure 760*l.* per annum. Neither of these cases shows me how I can secure a present payment upon shares which are at present yielding no income, and as to which it is a matter of speculation when they will yield any income.

In regard to the reversionary interest, counsel for the wife referred me to *Harrison* v. *Harrison*. (1) In that case Butt J. did not decide the point whether the Court could order a reversionary interest to be secured, and moreover it was stated in argument that it had a present value.

Counsel for the husband cited *Tallack* v. *Tallack and Broekema* (2), and contended that the Court had no power to order anything to be secured, the property being abroad. That was a case as to settlement of the property of a guilty wife. But by the time the question arose not only was the property abroad but she herself was domiciled abroad.

Registrar's order to stand except that liberty to apply as to security be struck out. Wife's costs.

Solicitors for the wife: *Lewis & Lewis.*

Solicitors for the husband: *Simmons & Simmons.*

(1) (1887) 12 P. D. 130. (2) [1927] P. 211.

R. M. M.

1930
Oct. 15.

HARRIS *v.* HARRIS.

Husband and Wife—Summary Jurisdiction (Separation and Maintenance) Acts, 1895 (58 & 59 *Vict. c.* 39, *s.* 6) *to* 1925 (15 & 16 *Geo.* 5, *c.* 51) *—Evidence—Admission of Adultery by Complainant Wife tendered in Evidence before Justices—Solicitor—Professional Privilege—Interview with Parties to contemplated Proceedings for Divorce—Rejection of Evidence.*

Communications made by one of the spouses pending the possible institution of proceedings for divorce to a solicitor who has hitherto acted as their common adviser are within the scope of professional privilege. In subsequent matrimonial proceedings in a court of summary jurisdiction between the spouses, the solicitor is not an admissible witness to prove a statement made by one of them involving an admission of adultery.

Appeal from a court of summary jurisdiction.

Julia Harris, the respondent on the appeal, obtained an order from a court of summary jurisdiction on June 12, 1930, finding her husband William Harris, the appellant, guilty of wilful neglect to maintain her and ordering him to pay her 5*s.* weekly and a sum for her costs. The parties were married in 1913. There had been no cohabitation since 1918. In 1919 there was discussion with reference to a suggested petition by the husband for divorce. About this time a solicitor, whom the wife had first consulted in 1918, was also consulted by the husband with reference to the differences of the parties. The solicitor continued to have interviews with the parties up to November, 1919. According to his evidence before the court of summary jurisdiction, his impression was that both parties were seen by him in separate rooms in his office in September, 1919. The evidence of the husband was that on the occasion of this visit to the solicitor the wife admitted adultery to the husband in the presence of the solicitor. The wife denied making any such admission. In this conflict of evidence the husband proposed to call the solicitor to prove that a similar admission had been made by the wife to him alone on the occasion of the same visit. The solicitor was sworn and said that the wife "probably regarded him as her

solicitor." Further evidence by this witness of what had passed between him and the wife was successfully objected to on the part of the wife as involving the disclosure of a privileged communication, with the result that the court of summary jurisdiction rejected the further evidence and on the other facts proved made the order in question. From this order the husband appealed to the Divisional Court on the grounds (inter alia) that the Court below was wrong in rejecting the further evidence of the solicitor, and also in holding any admission to the solicitor to be privileged in the proceedings before the court of summary jurisdiction.

Finnemore for the appellant. Privilege can only exist during the relationship of solicitor and client. There can be no privilege for any statement made by the respondent to the solicitor unless she was his client at the time of the statement. On the facts he was acting in the single capacity of solicitor for both parties, and that being so a communication to him by one of them is not privileged, and may be used by the other: *Baugh* v. *Cradocke*. (1) The principle is expressly applied to the case of spouses consulting the same solicitor in *Warde* v. *Warde*. (2) Cordery on Solicitors, ed. 1899, p. 232.

Thomas Bucknill for the respondent. Although some conversations may not be privileged merely by reason of the relationship of solicitor and client having been established: *Minter* v. *Priest* (3), the question is whether the respondent thought that the solicitor was acting for her when she made the statement. In that event, the respondent is alone entitled to waive the privilege so created: *Minet* v. *Morgan* (4), whether litigation has already commenced or merely happens to follow. In *Nias* v. *Northern and Eastern Ry. Co.* (5) this was laid down by Lord Cottenham L.C., whose judgment was approved by Lord Selborne L.C. in *Minet* v. *Morgan*. (4)

Finnemore in reply.

(1) (1832) 1 Moo. & Rob. 182.
(2) (1851) 3 Mac. & G. 365.
(3) [1930] A. C. 558; 46 Times L. R. 301.
(4) (1873) L.R. 8 Ch. 361.
(5) (1838) 3 My. & Cr. 355, 357.

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HARRIS v. HARRIS.

THE PRESIDENT (LORD MERRIVALE). This is a case which calls for close consideration, and we have had excellent assistance from the learned counsel who have addressed us upon it.

It is a case of a claim made by a wife in a court of summary jurisdiction for maintenance on the ground of wilful neglect to maintain. The fact is that the parties have not lived together for many years and that the husband has disclaimed liability to maintain. It is clear that he has disclaimed it, at any rate, for a long time, because, as he said, he had grounds for refusal in respect of the conduct of his wife in her position as a wife. It is said that he suspected her of adultery. In that state of the case he sets it up as a defence and he says: "She has admitted adultery: she admitted that to me." If the magistrates believed that, they could have rejected the claim. The woman denied it. In that state of the case a local solicitor is called about these transactions and he says that he as a solicitor has acted in respect of the differences between these parties, first of all in 1918 when there was a question of a separation because of differences—and then in 1919, when, according to the husband, he was making a charge against the wife, and according to the wife, she was not admitting that there was any truth in the charge and was insisting upon her rights. It seems that in 1919 the solicitor saw both of them. He had acted as their common adviser in 1918. In 1919, when there was this delicate position between them, he sees both, and his impression is that he saw them in separate rooms. There is some evidence that he saw them in separate rooms, but he saw both. The husband said: "She made an admission to the solicitor in my presence," and then it is proposed to examine the solicitor as to whether the wife had made an admission to him, or in his presence, of the adultery upon which the husband relies. Thereupon most naturally and I think properly the objection is taken by the wife's advisers that if there was any communication at that time it was a privileged communication. The justices considered that, and they say that they decide that the occasion was privi-

leged, and upon the case as it stands they find that the allegation of adultery is not established, and they make what virtually is a nominal order upon the application for maintenance. The question is whether the justices were right in holding that this was a privileged occasion. The matter is capable, of course, of discussion in a very ample measure. The kind of difficulties which arise are illustrated in a variety of cases and in a judgment of the highest authority to which reference has been made, but you have first to find out what is the relationship of the lay person and the professional man when the lay person confides in the professional man —whether it arises in a case of people who are on opposite sides ; or whether it is merely a friendly relationship where, though there may be a breach of personal confidence, there is not a sealed privilege ; or whether it is a relationship in which the solicitor is receiving the confidences of an actual or potential client and receiving those confidences under the seal of professional privilege.

I have considered the evidence here and I think that the question whether the solicitor received the confidences of the present respondent in the manner I have last described ought to be answered in the affirmative, and that the justices were right in answering in the affirmative. It is a narrow question, but, on the other hand, one of the safeguards of life and one of the securities of lay persons is to be able to approach a solicitor, when going to him as such, knowing he will not be compelled to disclose what in that relationship he has had confided to him.

In those circumstances I think the appeal fails.

BATESON J. I agree.

Appeal dismissed with costs.

Solicitors for the appellant: *Stooke-Vaughan & Taylor, for Higgs & Sons, Brierley Hill.*

Solicitors for the respondent: *Piesse & Sons, for A. C. Hayes & Dawkins, Birmingham.*

R. M. M.

1930
Nov. 14, 17.

THE LONDON.

Shipping—Practice—Staying Proceedings—Discretion—Lis alibi pendens—Actions in Scotland and in England.

A plaintiff's action will not be stayed in the Courts of this country, as being prima facie vexatious, merely because the plaintiff is defendant in an action commenced in Scotland in respect of the same subject-matter. It is a question for the discretion of the Court on the facts of each case.

The Peshawur (1883) 8 P. D. 32 considered and not followed.

Summons adjourned into Court for argument.

This was a summons taken out by the defendants, the owners of the steamship *London*, to stay all proceedings in an action in rem brought against them by the owners of the Norwegian steamship *Granli*. On October 27, 1930, a collision took place between the *Granli* and the *London* in the Firth of Tay. On October 29 the owners of the *London* arrested the *Granli* to found jurisdiction, and on the same day instituted an action in the Court of Session. The action was in personam, but, in accordance with the practice in Scotland, the *Granli* was re-arrested to obtain a maritime lien. On October 31, finding the *London* in an English port, the owners of the *Granli* threatened arrest and obtained an undertaking for bail, and, on the same day, issued a writ in rem against the owners of the *London*. Thereupon the defendants took out a summons to stay the proceedings. The assistant registrar refused a stay and the defendants appealed.

Carpmael for the applicants (defendants). Where there is an action pending in a Court of concurrent jurisdiction in England, Scotland, Ireland or the British Dominions a second action brought in respect of the same cause of action will be stayed as a matter of course, for such a proceeding is prima facie vexatious: see *McHenry* v. *Lewis* (1) and *The Peshawur*. (2) It is true that in the former case the plaintiffs were the same in both actions, but in *The Peshawur* (2),

(1) (1882) 22 Ch. D. 397. (2) 8 P. D. 32.

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where Sir Robert Phillimore stayed an action here on the ground that there was an action pending in Ceylon, the position was the same as in the present case, the plaintiffs in the one action were defendants in the other. That case was commented on, and disregarded as an authority, in *The Christiansborg* (1), but only in the dissenting judgment of Lord Esher, and the decision there turned on the question whether the second action was a breach of good faith; so also did *The Jasep* (2) and *The Golaa* (3), where Bateson J. stayed an action here although the proceedings abroad had been abandoned after the writ had been issued in this country but before the order to stay was made. In *The Glenluce* (4), where the original proceedings were in Belgium, Hill J. stayed the second action but gave the plaintiffs liberty to apply. It is admitted, however, that different considerations may be applicable where the first action is instituted in a foreign country.

[The following cases were also referred to: *The Bold Buccleugh* (5); *The John and Mary* (6); *The Lanarkshire* (7); *The Catterina Chiazzare* (8); *The Mali Ivo* (9); *Thornton* v. *Thornton* (10); *Mutrie* v. *Binney* (11); *The Mannheim* (12); *Logan* v. *Bank of Scotland* (*No.* 2) (13); *Egbert* v. *Short* (14); *The Janera* (15); *Carter* v. *Hungerford* (16); *Cohen* v. *Rothfield.* (17)]

R. F. Hayward for the plaintiffs. It is not suggested that the action is in fact vexatious. Prima facie a plaintiff has a right to select his tribunal and particularly so when there is a special Court which has the assistance of the Elder Brethren; there is no Court in Scotland exclusively for shipping cases and the proceedings are not in rem. In nearly all the cases cited the plaintiff was the same in both actions,

(1) (1885) 10 P. D. 141.
(2) (1896) 12 Times L. R. 375.
(3) [1926] P. 103.
(4) (1929) 34 Ll. L. R. 407.
(5) (1851) 7 Moo. P. C. 267.
(6) (1859) Swa. 471.
(7) (1855) 2 Spinks, 189.
(8) (1876) 1 P. D. 368.
(9) (1869) L. R. 2 A. & E. 356.
(10) (1886) 11 P. D. 176.
(11) (1887) 35 Ch. D. 614.
(12) [1897] P. 13.
(13) [1906] 1 K. B. 141.
(14) [1907] 2 Ch. 205.
(15) [1928] P. 55.
(16) (1915) 59 Sol. J. 428.
(17) [1919] 1 K. B. 410.

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and that fact alone is sufficient to distinguish *McHenry* v. *Lewis.* (1) *The Peshawur* (2), which was adversely commented on in *The Christiansborg* (3), has never been followed, and an appeal was entered from the decision, but the case was settled before the appeal was heard. In *The Janera* (4) Hill J. said that "the Court ought not to stay a plaintiff in the Courts of this country on the ground that he happens to be a defendant elsewhere." It is true that in that case the first action was in Egypt, but the judge did not limit his words by adding "elsewhere than in His Majesty's Dominions."

Carpmael replied.

LANGTON J. This summons arises out of a collision, which took place in the Firth of Tay, on October 27 last, between the steamship *London* and the steamship *Granli.*

In these circumstances, on October 29, the owners of the *London* commenced an action in the Scottish Courts against the owners of the *Granli.* On October 31 the owners of the *Granli,* finding the *London* within the jurisdiction of this Court, threatened an arrest; but upon an undertaking being given, the arrest was not actually completed. An action, however, in rem was commenced in this Court on the same day. Mr. Carpmael, on behalf of the owners of the *London,* now applies to have that action stayed.

The matter struck me as one of importance, and one in which the same circumstances might frequently recur, and I accordingly adjourned the summons into Court, for the purpose of having the matter fully argued. Mr. Carpmael has put before me, with his usual industry and candour, the whole of the relevant authority that bears upon this point, but while none of his argument has been in any way a waste of time, I think it is sufficient to deal with the three or four principal and nearest authorities to the point at issue. Of these authorities the earliest appears to be *McHenry* v. *Lewis.* (1) Mr. Carpmael advanced, as his main proposition, that where there is an action pending in England, Scotland, Ireland,

(1) 22 Ch. D. 397.
(2) 8 P. D. 32.
(3) 10 P. D. 141.
(4) [1928] P. 55, 57.

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or the British Dominions abroad, the Court will, as a matter of course, stay any second action commenced in respect of the same subject-matter, whether or no the plaintiff is the same in both actions, and *McHenry* v. *Lewis* (1) was the first of the authorities that he advanced in support of that proposition. At first sight there is something to be said for the citation of this authority: the headnote runs: "When a plaintiff sues a defendant for the same matter in two courts in this country, such a proceeding is prima facie vexatious, and the court will generally, as of course, put the plaintiff to his election and stay one of the suits. And the same principle applies where one of the actions is in the Queen's Courts, in Scotland, or Ireland or any other part of the Queen's dominions." Mr. Carpmael frankly recognized that that authority, useful to him as it was upon one part of his proposition, could not be said to be a case directly in point, since in *McHenry* v. *Lewis* (1) the plaintiff was the same in both actions, and it is not immaterial to notice in passing that, as the statement is there couched in the headnote, the principle laid down is that the Court will put the plaintiff to his election, and stay one of the suits. In the present case we are confronted with a position in which the plaintiff in one case is defendant in another, and therefore that case by itself would not carry, nor did Mr. Carpmael contend that it would carry him, the whole length of the way he wants to go.

The next case that seems to me to be sufficiently near to call for mention is *The Peshawur* (2), a judgment of Sir Robert Phillimore, in which two proceedings were afoot: one was an action in this Court, and the other was an action in the Vice-Admiralty Court of Ceylon. The subject-matter was a collision between ships; the plaintiff in one action was the defendant in the other. This case is considerably nearer to the facts which I have to consider upon this summons. Unfortunately, Sir Robert Phillimore, in giving judgment, did not in any way indicate the grounds which guided him to his decision; he put it purely as a question of discretion, and exercised his discretion in favour

(1) 22 Ch. D. 397. (2) 8 P. D. 32.

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of stopping all the proceedings in this Court until after the suit at Colombo had been heard. Mr. Hayward, for the respondents, pointed out to me that according to a note in the Law Reports, the defendants, the owners of the *Peshawur*, appealed, but before the appeal came on for hearing, the action was settled by arrangement between the parties. Now if this decision stood in every way unimpugned, I should have difficulty, perhaps, in distinguishing it. It is conceded that the present case is one for my discretion, but I agree that I should have some difficulty, as a matter of discretion, in saying that the present case was less hard on the party who is asking for a stay than *The Peshawur*. (1) But that case does not stand entirely unimpugned. There is the point that it was under appeal, but was never reviewed, and Mr. Hayward also reminds me that so far as he can discover the only case in which it has been cited as an authority is *The Christiansborg* (2), where it received no great honour, and indeed was seriously impeached, by the Master of the Rolls. Lord Esher, in dealing with *The Peshawur* (1), says: "Take the case of *The Peshawur* (1), which was an action in personam against the owner of the ship. It appeared, as stated in the headnote, that a 'cause of damage in rem relative to the same collision had, prior to the proceedings in this Court, been instituted by the owners of the P. against the G. in a Vice-Admiralty Court abroad, and was then pending.' That is all that was shewn to the Court. Sir R. Phillimore stayed the proceedings here, but he gives no reason for so doing, so that it is a decision contrary to the decision of the Court of Appeal. But it seems that the parties intended to appeal, but settled the dispute before doing so, and I cannot regard this case as any authority." It is true that Lord Esher was giving a dissenting judgment in the particular case in hand; but in view of all the circumstances, I do not feel that I can regard *The Peshawur* (1) as a binding authority. Here the owners of the *Granli* are saying to this Court: "We have taken no step at all

(1) 8 P. D. 32. (2) 10 P. D. 141, 149.

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towards proceedings in Scotland, we do not want to try the action in Scotland, and, in fact, in the only other matter arising out of this collision in which we could manifest our intentions, namely, a salvage action by a Scotch tug, we have appeared here in England and we want that case and this case tried in this Division." I think that prima facie, parties who come to this Court have a right to have their trial in this Court, and that I am not justified in depriving them of this right until a clear case has been made out against them.

Another case which was cited, and which bears closely upon the subject, is *The Janera*. (1) In that case Hill J. said: "It seems to me quite clear that the Court ought not to stay a plaintiff in the Courts of this country on the ground that he happens to be a defendant elsewhere." If in that case the second action had been in either Scotland or some other British Dominions, that dictum of Hill J. would be directly applicable to this case, and I should not have had any difficulty in the matter; I should willingly have followed what Hill J. there lays down. The second action, however, in *The Janera* (1) was in Egypt, and not the British Dominions, and I do not think it would be fair to read the learned judge's judgment in that case in the sense for which Mr. Hayward contended—namely, in the widest sense of "elsewhere," as meaning not only in a foreign country, but also in any British Dominion. Every one knows the care with which Hill J. used language and the care which he devoted to making his judgments appropriate to the case in hand without travelling unnecessarily outside the matter. A little further on in his judgment he says this: "I cannot think that I ought to stay a proceeding properly brought in this country solely because the people who have brought that action are defendants in proceedings in Egypt."

In my opinion it would not be right to say that Hill J. had in mind of necessity a case in which the second proceedings had been brought within the British Dominions, e.g. in Scotland, and what he would have said upon that matter I cannot

(1) [1928] P. 55, 57.

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speculate here. I do not think I can shelter myself under Hill J.'s judgment, and say that he has laid this matter down as law. Indeed, no judgment can conclude this Court as a matter of law, where the question is one of discretion. There may be a variety of features pointing one way or another which would distinguish the cases from one another, and I do not suggest that anything that I am saying now will be in the nature of a binding decision for the future in cases to which other considerations may apply, even though the two actions may be respectively in this Court and in Scotland.

The conclusion, therefore, at which I arrive is that this application fails, and that I should not exercise my discretion to stay the action which has been brought by the owners of the *Granli* in this case. The summons will be dismissed with costs.

Solicitors for the applicants: *Wm. A. Crump & Son.*
Solicitors for the plaintiffs: *Thomas Cooper & Co.*

E. C. M. T.

THE BREMEN.

1930
Nov. 25, 26;
Dec. 11, 12,
15, 16, 17.

Shipping—Collision—Navigation in Fog—Fog Signals heard abaft the Beam —Regulations for Preventing Collisions at Sea, 1910, *art.* 16—*Duty to stop apart from the article.*

Under art. 16 of the Regulations for Preventing Collisions at Sea, a steam vessel hearing the fog signals of a vessel, apparently forward of the beam, is required to stop her engines and then navigate with caution.

The *B.*, a large liner going down channel in a dense fog at a speed of about 4 knots, heard, about abeam or a little abaft it, the fog whistle of the *B. G.* After the whistle had been heard four or five times more, getting louder and nearer and still on the same bearing, the master of the *B.* decided that he must act. He accordingly starboarded and put his engines ahead to assist his helm. The *B. G.* then came into sight, 100 to 150 yards away on the starboard side, crossing the bows of the *B.* from starboard to port, and the two vessels came into collision:—

Held, that, while the main cause of the collision was the bad navigation of the *B. G.*, the *B.* was also partly to blame, inasmuch as the fact that the fog signals of the *B. G.* were getting louder and nearer on the same bearing was a clear indication of danger; and that accordingly, good seamanship required the *B.* to stop after hearing the second or third blast to see if the bearing would draw ahead or remain the same. Both vessels accordingly held to blame, the *B. G.* to the extent of 80 per cent. and the *B.* 20 per cent.

Action of Damage by Collision.

The plaintiffs were the owners of the steamship *British Grenadier*; the defendants were the owners of the steamship *Bremen*.

The collision took place about 10.21 A.M. on April 24, 1930, in the English Channel about 4½ miles off Dungeness during a dense fog. The *British Grenadier*, a vessel of 14,000 tons displacement, 440 feet long, was bound from Abadan to Grangemouth with a cargo of 9300 tons of crude petroleum. The *Bremen*, a quadruple screw steamship of 51,656 tons, 939 feet in length, with geared turbine engines of 96,000 h.p. indicated, was on a voyage from Bremerhaven to New York, via Southampton, with passengers and cargo, manned by a crew of 1005 hands.

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Under art. 16 of the Regulations for Preventing Collisions at Sea, "a steam vessel hearing, apparently forward on her beam, the fog signal of a vessel, the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over."

The case is reported only on the question as to the duty of a vessel to stop after hearing fog signals, although the sound is coming from abeam or abaft the beam.

C. R. Dunlop K.C. and *Lewis Noad* for the plaintiffs.

W. Norman Raeburn K.C. and *R. F. Hayward* for the defendants.

BATESON J. I have come to the conclusion that both these vessels are to blame, the *British Grenadier* to the extent of 80 per cent. and the *Bremen* 20 per cent. The real and main cause of the collision was the excessive speed of the *British Grenadier* during the last ten minutes before the collision. Her general navigation was extraordinary, it could hardly have been worse. [His Lordship then dealt in detail with the manoeuvres of the *British Grenadier*, which are immaterial for the purposes of this report, and as regards the navigation of the *Bremen* continued as follows :] After 9.8, when she encountered fog, the *Bremen* felt her way down channel, dealing carefully with the traffic, of which there was a good deal, and from 9.22 she worked her way mostly with her two inner screws only, which at half speed give her about 4 knots. About 10.11 she was all stopped and she blew the two long blast signal certainly once, perhaps twice. At 10.12½ she went on half speed on the two inner screws sounding a long blast. About 10.16 the *Bremen* heard the *British Grenadier* for the first time, apparently a little abaft the starboard beam. I am satisfied that the whistle of the *British Grenadier* was somewhere about the beam or a little abaft it. Under these circumstances there was no necessity under art. 16 for the master of the *Bremen* to stop his engines, and he did not do so. To go on after hearing one whistle

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on the beam is perfectly safe in that position, because the rule as to stopping only applies to a sound signal apparently forward of the beam. Then the whistle sounded louder and nearer. The master heard it about six times and always on the same bearing, and therefore, I think, it indicated risk, but he kept on until about 10.19½, when he decided that he must act, and he starboarded his helm. He had not seen the *British Grenadier* at that time. The *Bremen* did not go off as quickly as the master wished under her starboard helm, and he increased his engine power, first putting both the starboard engines full speed ahead to assist the helm, and then all four engines. Almost immediately afterwards he saw the *British Grenadier* at a distance of about 100 to 150 yards bearing about 6 or 7 points on the starboard bow, crossing and passing him. As soon as he saw her he put all four engines full speed astern, but the two vessels came together at 10.21, the starboard bow of the *Bremen* striking the port side of the *British Grenadier*.

I have no doubt that the *British Grenadier* is to blame, and much more to blame than the *Bremen*. The *British Grenadier* had greater speed. She was going six, seven or eight knots, and that of course was far too fast. She ought to have stopped on hearing before the beam the *Bremen's* one long blast immediately after the two long blast signal. She did not sound her whistle in accordance with the regulations ; she did not navigate with caution after hearing the *Bremen*. There is nothing to excuse the *British Grenadier's* extraordinary manœuvres in the fog. She ought never to have gone off to the northward and westward with speed, turning herself right across the line of traffic, and then come ahead again in the reckless manner in which she did. All these things contributed to the collision and the damage, and were continuing causes of it.

The navigation of the *Bremen*, on the other hand, was most careful. In the last ten minutes she had been all stopped for fog. She heard the whistle of the *British Grenadier* on her beam, as she thought, and I think she was right. But there is a difficult question in her case. I think she was

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very unlucky to have met the *British Grenadier*, but I cannot excuse her entirely for her navigation after hearing the fog signals of the *British Grenadier*. I have considered carefully with the Elder Brethren the following matter, and I put it to them, not exactly in the form of a question, but in this way: The *Bremen* heard single long blast signals of the *British Grenadier* abeam, or abaft the beam. That vessel must be either a ship on the same course, an opposite course, a diverging course, or a converging course. If it is one of the first three of those it does not matter—it is only the last that matters. If the vessel is on a converging course going up channel the courses would intersect astern of the *Bremen*; if the vessel is going down channel, there is a danger of the courses intersecting ahead of the *Bremen*. The fact that the signals keep the same bearing, and get louder and nearer, is a clear indication of danger of collision. What ought a good seaman to do? I think—and the Elder Brethren think—the right navigation is to wait and see. That is to say, stop your engines as soon as you realize that the bearing is not changing. You are not bound to stop under the rules because the whistle signals are not forward of your beam, but when the vessel abeam of you is blowing signals on the same bearing, getting nearer and louder, I think a ship ought to stop. If you stop, the bearing may draw ahead, or it may remain the same. If it does not draw ahead, but remains the same, still getting nearer, at any rate you will know what the ship is doing and you will be prepared for any action that may be necessary. You have then ascertained what the other ship is doing; if it draws ahead you remain stopped. If the master was afraid of his flank—having regard to the number of lives he had got on board his ship—he might, perhaps, when he stopped, have reversed his port propellers and starboarded his helm, and he might not then be to blame if he guesses right. But I think there would be even a risk in that. At any rate, it seems to me, that stopping was the right manœuvre. In this case the master of the *Bremen*, a fine seaman, thought it best to preserve his flank from attack if he could, and he

thought it best to keep his speed, such as it was, and turn his ship away. He was in a difficult position, but I think the right navigation is that which I have described. He ought to have stopped when he knew for certain, as he would, after the second or third blast, that the ship was approaching on the same bearing causing danger of collision.

It is, perhaps, rather hard measure under these circumstances, but when one remembers how important it is in fog to stop the engines I do not think I am wrong in saying that he is somewhat to blame, in this particular case. I have marked my view of the difference between the negligence of the two ships in the proportions at which I have arrived.

The plaintiffs must pay half the defendants' costs.

Solicitors for the plaintiffs: *Wm. A. Crump & Son.*
Solicitors for the defendants: *Constant & Constant.*

E. C. M. T.

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Dec. 12.

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Divorce — Practice — Periodical Payments — Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 196—*Restricted Application of Section—Matrimonial Causes Act*, 1884 (47 & 48 *Vict. c.* 68).

The powers conferred on the Court by the Judicature (Consolidation) Act, 1925, s. 196, to vary periodical payments is restricted in operation to cases of restitution of conjugal rights and does not apply to orders for alimony pendente lite.

Adjourned Summons. Wife's petition for divorce.

The petition was filed on March 6, 1930. On March 11, 1930, the petitioner filed a petition for alimony pendente lite. An order was made on this latter petition on March 28, 1930, by consent for alimony pending suit at the rate of 2500*l.* per annum free of tax, and the order was expressed to be " without prejudice " and with " liberty to apply." The order was consented to as the result of the illness of the respondent at the time and his consequent inability to instruct his solicitors fully. On June 18, 1930, the case being undefended a decree nisi was pronounced. Payments continued to be made under the order, and as it appeared that their rate was largely in excess of that which the usual practice would have justified had there been an examination of the means of the respondent, he desired to have the order reviewed. On an appointment for this purpose the registrar refused to proceed, and the respondent appealed to the judge in chambers. On November 24, 1930, the judge in chambers having heard the parties adjourned the matter into Court for judgment.

[The case is reported solely on account of the interpretation placed by the Court on the Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49), s. 196 (1), dealing with periodical payments.]

(1) The Supreme Court of Judicature (Consolidation) Act, 1925, s. 196: " The court may from time to time vary or modify any order for the periodical payment of money made under the provisions of this Act relating to matrimonial causes and matters either by altering the times of payment or by increasing or diminishing the amount, or may temporarily suspend the order as to the whole or any part of the money ordered to be paid, and subsequently revive it wholly or in part, as the court thinks just."

R. F. Bayford K.C. (*H. R. Barker* with him) for the petitioner.

Sir Patrick Hastings K.C. (*G. C. Tyndale* with him) for the respondent.

1930. Dec. 12. (In the absence of the learned judge (Langton J.) his written judgment was read by LORD MERRIVALE P.)

[Having dealt with the expressions in the order "by consent," "without prejudice," and "liberty to apply" the learned judge continued:]

I hold that the original order of the registrar is open to review and that the registrar was wrong in refusing the relief claimed by the respondent. So far the matter is to my mind clear and simple, and if my conclusion is right this appeal succeeds without further argument. But it was further contended before me by counsel for the respondent that in any event power to modify the order arises under the Judicature (Consolidation) Act, 1925, s. 196. (1) In case I am wrong and the parties elect to take the matter further it is, I think, desirable that I should state shortly my view upon this further point argued before me in chambers. For the purpose of this aspect of the matter I have to assume that the order of the registrar of March 28 was a final and not an interim order. The question then turns upon the meaning of the words "periodical payment" in the Judicature (Consolidation) Act, 1925, s. 196. (1) I think that the petitioner is right upon this further and to my mind rather technical point. Counsel for the respondent drew my attention to the fact that s. 196 stood in a group of sections under the heading of "Miscellaneous." He claimed that this was the last place in which one would expect to find a section the operation of which was confined to the topic of restitution of conjugal rights, more especially since in an earlier section of the Act there are sections from 185 to 187 inclusive which stand under the heading "Judicial Separation and Restitution of Conjugal Rights." He added, as I have indicated above, an argument upon the wide nature and plain meaning of the words

(1) See note (1) ante, p. 26.

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"periodical payment." I think I have, however, to consider the history of this expression "periodical payment" in divorce practice and in particular the fact that the section itself is so largely copied from the earlier Act of 1884 (47 & 48 Vict. c. 68). Also in construing the words of this section it seems impossible to ignore the fact that this same expression "periodical payments" is definitely used in s. 187 (sub-ss. 1 and 2) of the Act of 1925, and with reference solely to the question of restitution of conjugal rights. So far as I know this expression or term is not used elsewhere in the statute. Accordingly, notwithstanding that the words are in themselves wide enough to cover an order final or otherwise for alimony pendente lite, I think that I ought to hold that the term or expression "periodical payment" was, and is, employed in the section only with reference to matters appertaining to restitution of conjugal rights.

[Having further dealt with authorities upon the operation of a consent order in divorce by way of estoppel the learned judge concluded:]

The result of my judgment will be that the appeal will be allowed and the matter is, therefore, remitted to the registrar to be dealt with.

Leave to appeal. Costs reserved.

Solicitors for the petitioner: *Kenneth Brown, Baker, Baker.*
Solicitors for the respondent: *Reynolds, Sons & Gorst.*

R. M. M.

Note.—An appeal from the above decision was heard before the Court of Appeal on Jan. 19, 1931, and was dismissed. The Court held upon the facts and the correspondence that the consent order of March 28, 1930, was an interim order and therefore open to review. No question of law was decided.

W. I. C.

Approved. CASEY *v.* CASEY [1949] P. 420

INVERCLYDE (OTHERWISE TRIPP) *v.* INVERCLYDE.

1930
Nov. 4, 11, 12, 24.

Nullity of Marriage—Impotence—Status of Parties—Judgment in rem—Test of Jurisdiction—Domicil—Impotence distinguished from other Grounds for annulling Marriage.

A decree annulling a marriage on the ground of impotence is a judgment in rem altering the status of the parties, and can be pronounced only by the Court of their domicil. A decree annulling a marriage on this ground deals with a marriage which till the date of the decree was voidable only and not void. In substance it is a decree for the dissolution of that marriage, and is thus distinguished from decrees annulling marriages for illegality or informality.

Dicta in *Salvesen* v. *Administrator of Austrian Property* [1927] A. C. 641 followed.

PETITION by the woman for nullity of marriage on the ground of the impotence of the man. The parties went through a ceremony of marriage in London on March 21, 1929. The petition, which was dated August 1, 1930, alleged that at that time both parties were domiciled in Scotland and that the petitioner was resident in England, and that the respondent had places of residence both in England and Scotland. The respondent appeared under protest disputing jurisdiction. The petitioner filed a petition for alimony pendente lite dated August 23, 1930. The respondent took out a summons dated August 25, 1930, returnable before a registrar, asking for the dismissal of the principal petition for want of jurisdiction. The registrar referred the summons to the judge, who adjourned it into Court for argument. The respondent took out a further summons dated October 21, 1930, returnable before a judge for the dismissal of the petition for alimony pendente lite. This was also adjourned into Court for argument at the same time as the previous summons. It was suggested to be a material circumstance that it was provided by an ante-nuptial settlement dated March 20, 1929, that the rights of the parties should be interpreted and construed according to the law of Scotland.

Norman Birkett K.C. (*Thomas Bucknill* with him) for the respondent. The petition should be dismissed on the ground

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of the Scotch domicil of the parties. There are three classes of petitions for nullity of marriage: (*a*) in cases where the marriage is void for want of form, in which two jurisdictions may be involved, that of the lex loci and that of the lex domicilii; (*b*) where it is void from disability to contract, in which also there may be two available jurisdictions; and (*c*) where, as here, the question is whether a voidable marriage should be declared void.

The petitions of class (*c*) are akin to those for divorce, and like principles apply; and the only forum is that of the domicil, and therefore in this case where the domicil is Scotch the English Court has no jurisdiction.

There is no precise decision upon the point. In *Salvesen or von Lorang* v. *Administrator of Austrian Property* (1) the marriage took place in Paris of a domiciled Scotchman and an Austrian. Their domicil was in Wiesbaden, and the Court there held their marriage void. The competence of that Court was admitted and the appellant contended for its sole competence, arguing that the same reasons of universality which in cases of divorce made domicil the test of jurisdiction extended also on the point of status to cases of nullity. Lord Haldane in his judgment says (2): "Whether there cannot be jurisdiction which is not that of the domicil in restricted instances to entertain a suit for nullity is a question we have not before us for determination. For, as I have pointed out, the only relevant issue is whether the German Court was competent as against all other Courts conclusively to declare the marriage in the present case void. I am unable as matter of principle to see how its competence as the Court of the domicil can be successfully challenged, and if it was competent the decree brought the claim, even of the respondent who was not a party before it, to an end. For the decree (of the Wiesbaden Court) did undoubtedly alter the status of the husband and wife. They ceased retrospectively to have been married people in the community of their country . . . . that status must be taken to have been a res and the judgment was therefore one in rem."

(1) [1927] A. C. 641. (2) [1927] A. C. 654.

[BATESON J. That is the effect of a decree of dissolution.]

He points out also that in the Court below (the Court of Session) (1) the Lord President (Lord Clyde) thought that a decree for nullity founded on impotence fell within the same category as an alteration of status. In *Warrender* v. *Warrender* (2) Lord Brougham in speaking of the lex loci being invoked to deal with matters affecting the nature of the contract observes that the fallacy is this: "It confounds incidents with essence; it makes the rights under a contract or flowing from or arising out of it parcel of the contract; it makes the mode in which judicatures deal with those rights, and with the contract itself; part of the contract instead of considering, as in all soundness of principle we ought, that the contract and all its incidents, and the rights of the parties to it, and the wrongs committed by them respecting it, must be dealt with by the Courts of the country where the parties reside, and where the contract is to be carried into execution." In our submission that means the Court of the domicil. A contrary view, he says, would mean that a marriage indissoluble by the lex loci would be indissoluble everywhere, and conversely that in cases where desertion or incompatibility of temper were grounds for dissolution by the lex loci contractus, a party might sue here for divorce a vinculo on the like grounds. *Simonin* v. *Mallac* (3) may be relied on against us, but it does not touch the present case. It was a case of conflict of laws as to validity of marriage. There is no question here of the validity of the marriage as celebrated. There is no difference in principle between a marriage which is voidable and a marriage that can be dissolved. They both differ from a marriage void ab initio. As Sir James Hannen puts it in *Turner* v. *Thompson* (4): "If she had thought fit she might have remained a wife, enjoying all the advantages of a wife, save that of marital intercourse." In *Ogden* v. *Ogden* (5) Lord Gorell (then Sir Gorell Barnes) quotes Lord Campbell L.C. in *Brook* v. *Brook* (6): "Although the forms of celebrating

(1) 1926 S. C. 598, 616.
(2) (1835) 2 Cl. & Fin. 488, 533.
(3) (1860) 2 Sw. & Tr. 67.
(4) (1888) 13 P. D. 37, 41.
(5) [1908] P. 46, 67.
(6) (1861) 9 H. L. C. 193.

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the foreign marriage may be different from those required by the law of the country of domicil the marriage may be good everywhere. But if the contract of marriage is such, in essentials, as to be contrary to the law of the country of domicil, and is declared void by that law, it is to be regarded as void in the country of domicil, though not contrary to the law of the country in which it was celebrated." The present is not a question of form but of validity according to the law of the domicil. It is a question of personal capacity and must depend upon the law of the domicil: *Sottomayer* v. *De Barros*. (1) The reasonable inference to be drawn from the language used by Sir Gorell Barnes in *Ogden* v. *Ogden* (2) is that in his view a suit for nullity on the ground of impotence might be instituted either in the Court of the domicil or in that of the place of celebration. In *Salvesen* v. *Administrator of Austrian Property* (3) Lord Dunedin in commenting on *Ogden* v. *Ogden* (4) says: "I am not bound by *Ogden* v. *Ogden* and so far as the dicta (in that case) contradict what I have just said, I do not agree with them." And Lord Phillimore adds (5) that: "The case (*Ogden* v. *Ogden*) was unfavourably commented upon in the judgment of the Privy Council in *Attorney-General for Alberta* v. *Cook* (6), and that, whether it were a right or a wrong decision upon the very peculiar facts of the case" he (Lord Phillimore) could not "regard it as an authority that English law would not recognize the decision of a competent Court having jurisdiction over the place where the parties are domiciled as final and conclusive." Finally Lord Phillimore says (7): "If the Court is a competent Court, still more if it is the only competent Court and in my opinion the Wiesbaden Court was the only competent Court for these parties. . . . ." That is to say the Court of the domicil is that of conclusive jurisdiction as to matters of form and probably also in case of impotence.

(1) (1877) 3 P. D. 1, 5.
(2) [1908] P. 46, 67.
(3) [1927] A. C. 641, 662.
(4) [1903] P. 46.
(5) [1927] A. C. 641, 670.
(6) [1926] A. C. 444.
(7) [1927] A. C. 641, 671.

Nullity claims other than those on the ground of impotence negative marriage. Claims on the ground of impotence are akin to those for divorce and affirm it. Even if the claim is justified on the facts the complainant may have approbated the marriage: *G.* v. *M.* (1) It appears from the report that the appeal committee in *Salvesen's* case (2) recognized the question arising as one of status.

[They also referred to *Roberts* v. *Brennan* (3); *Mitford* v. *Mitford* (4); *Shaw* v. *Gould* (5); *Chetti* v. *Chetti* (6); and *Linke* v. *Van Aerde.* (7)]

Cotes-Preedy K.C. and *Hon. Victor Russell* for the petitioner. The summons should be dismissed. The procedure is misconceived. A respondent objecting to the jurisdiction who appears under protest should take out a summons for directions as to the determination of the questions arising on the protest: Matrimonial Causes Rules, 1924, r. 16.

[The respondent took out a summons pro forma forthwith, and the learned judge made an order upon the summons for the immediate trial of the issue as to jurisdiction, and the petitioner's objection on the point of procedure was withdrawn.]

The marriage was in England. Both parties had residences in England. The respondent was actually in England at the date of the petition. The petitioner is only domiciled in Scotland by reason of the marriage. Marriage here is sufficient to give jurisdiction: Dicey, Conflict of Laws, 4th ed., p. 302, r. 65.

Although s. 22 of the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85) (8), is repealed by the Supreme Court of

(1) (1885) 10 App. Cas. 171.
(2) [1927] A. C. 641.
(3) [1902] P. 143.
(4) [1923] P. 130.
(5) (1868) L. R. 3 H. L. 55.
(6) [1909] P. 67.
(7) (1894) 10 Times L. R. 426.
(8) The Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 22: "In all suits and proceedings, other than proceedings to dissolve any marriage, the said Court shall proceed and act and give relief on principles and rules which in the opinion of the said Court shall be as nearly as may be conformable to the principles and rules on which the ecclesiastical courts have heretofore acted and given relief, but subject to the provisions herein contained and to rules and orders under this Act." (Repealed by Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49), s. 226, Schedule VI.)

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Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49), s. 226, the effect of ss. 32 (1) and 103 (2) of the later Act is to continue its operation, and the later section covers nullity proceedings. The respondent professes to divide nullity suits into three classes. In *Linke* v. *Van Aerde* (3) no such distinction was drawn by Barnes J., who assumed jurisdiction though the domicil was foreign.

[BATESON J. The point made against you is that nullity on the ground of impotence involves the question of status.]

There is no ground for distinguishing nullity on that ground from nullity on other grounds. The principle of the Ecclesiastical Court was that every marriage must be tried according to the law of the country in which it took place: Shelford's Law of Marriage, 1841, p. 131. Even if it is contended that marriage is not complete without consummation, there is no reason why the inquiry whether consummation has occurred and whether therefore the marriage is valid should not be held in the same jurisdiction as that in which the marriage was celebrated. Shelford cites *Dalrymple* v. *Dalrymple* (4) and *Sinclair* v. *Sinclair*. (5) He states that the power of the Court is in personam whereas if status is affected that power must be in rem.

The Judicature (Consolidation) Act, 1925, makes no

(1) The Judicature (Consolidation) Act, 1925, s. 32: "The jurisdiction vested in the High Court and the Court of Appeal respectively shall, so far as regards procedure and practice, be exercised in the manner provided by this Act or by rules of court, and where no special provision is contained in this Act or by rules of court, with reference thereto, any such jurisdiction shall be exercised as nearly as may be in the same manner as that in which it might have been exercised by the Court to which it formerly appertained."

(2) The Judicature (Consolidation) Act, 1925, s. 103: "Save as is otherwise provided by this Act or by rules of court, all forms and methods of procedure which, under or by virtue of any law, custom, general order or rules whatsoever, were formerly in force in any of the Courts the jurisdiction of which is vested in the High Court or the Court of Appeal respectively, and which are not inconsistent with this Act or with rules of court may continue to be used in the High Court and the Court of Appeal respectively in the like cases and for the like purposes as those in and for which they would have been applicable in the former respective Courts."

(3) (1894) 10 Times L. R. 426.

(4) (1811) 2 Hagg. Con. 54.

(5) (1798) 1 Hagg. Con. 294.

distinction between the different kinds of nullity. The true principle is to be found in *Ogden* v. *Ogden* (1), where the principle that domicil affords the test of jurisdiction is expressly laid down to be subject to this qualification that a marriage exists, the validity of which is recognized in the forum where the suit is brought and that both parties are domiciled there. The importance of the test of domicil lies in the necessity for avoiding the result of a man and woman being held spouses in one jurisdiction and not in another. Gorell Barnes J. in *Armytage* v. *Armytage* (2), quoting Lord Penzance in *Wilson* v. *Wilson* (3); *Ogden* v. *Ogden* (1); and *Simonin* v. *Mallac* (4) are authorities in our favour. In *Mitford* v. *Mitford* (5) it was expressly argued that in a case of nullity on the ground of impotence, the marriage being voidable only, the woman took the domicil of the man, and that only the Court of that domicil could declare the marriage void; and having regard to the judgment in that case that argument must be taken to have been overruled. Moreover that case is an authority for the proposition that the validity of a marriage is properly cognizable in the forum of its celebration though the man may have a different domicil. In *Salvesen* v. *Administrator of Austrian Property* (6) Lord Haldane expressly says that the question, his observations on which have been prayed in aid, was not the question then before the House. His opinion is therefore confessedly obiter. The same observation applies to Lord Dunedin's speech. In *Greenstreet* falsely called *Cumyns* v. *Cumyns* (7) Sir William Scott uses these words: "... incompetency on the part of the man, to perform the duties of marriage; a capacity to perform which is necessary to render it valid." This is tantamount to saying that "voidable" is merely a term of art and that impotence in effect renders a marriage void ab initio.

At the time when nullity suits first became triable in this Court the doctrine of domicil as the test of jurisdiction was

(1) [1908] P. 46, 82.
(2) [1898] P. 178, 186.
(3) (1872) L. R. 2 P. & M. 435, 442.
(4) 2 Sw. & Tr. 67.
(5) [1923] P. 130, 133.
(6) [1927] A. C. 641, 654.
(7) (1812) 2 Hagg. Con. 332.

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only in course of development even in cases of dissolution of marriage, as is instanced by *Brodie* v. *Brodie* (1), where "bona fide residence of the husband in this country not casually or as a traveller" was held to found jurisdiction of the Court to dissolve his marriage. In 1872, in *Wilson* v. *Wilson* (2), Lord Penzance expressly refrained from giving a decision whether "mere residence short of domicil in this country" was sufficient to found jurisdiction.

Not till 1895 was the principle for the first time formulated by a Court of supreme authority that the domicil for the time being of the married pair affords the only true test of jurisdiction in cases of dissolution: *Le Mesurier* v. *Le Mesurier* (3), and the doctrine has never yet been extended to suits for nullity on the ground of impotence by any express or binding decision.

With regard to the case of *Greenstreet* v. *Cumyns* (4) there must have been local residence to make the case triable in the Consistory Court of London. In *Pollard* falsely called *Wybourn* v. *Wybourn* (5), a case of nullity on the ground of the impotence of the man, jurisdiction appears to have been founded on the local residence of the woman, because it is stated in the report that the man had been served with the monition or order for inspection in France. *Raeburn* v. *Raeburn* (6) follows *Pollard* v. *Wybourn* (5), the Court proceeding on residence only. The judgment in *Roberts* v. *Brennan* (7) lays down broadly that residence and not domicil is a test of jurisdiction in a nullity case irrespective of the nature of the claim for nullity, and in *Mitford* v. *Mitford* (8) Lord Merrivale P. adopted *Roberts* v. *Brennan*. (7) Neither of these cases can be said to be overruled by *Salvesen* v. *Administrator of Austrian Property*. (9) The judgments in that case do not refer to *Mitford* v. *Mitford* (8), which presumably they would have done had its decision been disapproved, as the case had been cited in argument.

(1) (1861) 2 Sw. & Tr. 259, 263.
(2) (1872) L. R. 2 P. & M. 435, 442.
(3) [1895] A. C. 517.
(4) (1812) 2 Hagg. Con. 332.
(5) (1828) 1 Hagg. Ecc. 725.
(6) (1928) 44 Times L. R. 384.
(7) [1902] P. 143.
(8) [1923] P. 130.
(9) [1927] A. C. 641.

Mitford v. *Mitford* (1) had been referred to in the argument in *Salvesen* v. *Administrator of Austrian Property* (2) as an instance of the decree of nullity of a competent Court binding a party to a matrimonial suit not domiciled within the jurisdiction of the Court, and the House of Lords reserved its decision for a considerable period. That has a significant bearing on the suggestion that *Salvesen* v. *Administrator of Austrian Property* (3) decides the present case. In *Herbert* v. *Herbert* (4) it is referred to as an established principle that the validity of every marriage must be tried according to the law of the country in which it took place. If the dictum of Lord Phillimore in *Salvesen* v. *Administrator of Austrian Property* (3) is to be supported it has the effect of revoking a long chain of authority by a mere side wind. Apart from the suggested authority of *Salvesen* v. *Administrator of Austrian Property* (3) as a decision that domicil is the test of jurisdiction in cases of nullity the argument on the other side militates against the principle laid down in *Simonin* v. *Mallac* (5)—namely, that " every nation has a right to impose on its own subjects restrictions and prohibitions as to entering into marriage contracts either within or without its own territories." A similar limitation of the exclusive test of domicil is to be found in *Chetti* v. *Chetti* (6), where on the issue of the validity of an English marriage the right of one of the contracting parties to carry about with him an incapacity imposed by the law of his domicil was negatived.

Norman Birkett K.C. in reply. In divorce the jurisdiction formerly depended on residence. This test of jurisdiction has been gradually replaced by that of domicil, and there is no reason why the same test should not replace the older test in the case of the similar relief of nullity on the ground of impotence. This form of nullity being now looked on as a judgment in rem (*Salvesen* v. *Administrator of Austrian Property* (3)) residence should be abandoned as a test. No case of a decree for nullity in the Ecclesiastical Courts can be found where

(1) [1923] P. 130.
(2) [1927] A. C. 641, 647.
(3) [1927] A. C. 641.
(4) (1819) 3 Phill. Eccl. 58, 63.
(5) 2 Sw. & Tr. 67, 83.
(6) [1909] P. 67.

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the parties were domiciled abroad. In *Lindo* v. *Belisario* (1) (a case involving the validity of a Jewish marriage) Sir William Scott said: "The Ecclesiastical Court has an undoubted jurisdiction upon the general law of marriage, so far as the legality of that contract is constituted by the law of this country. It also examines questions of foreign marriages in cases of British subjects and sometimes of aliens: and it does this from necessity, in order to prevent a failure of justice; and with the satisfaction of knowing that the principles which regulate English marriages are such as are also generally applicable to marriages of foreign Christian countries; the marriage law of Europe being founded on the same general principles, and having for its basis the antient canon law; so that there is not much danger that the Court can proceed wrongly on such general principles and on such a basis. This is a question of marriage of a very different kind, between persons governed by a peculiar law of their own and administered to a certain degree by a jurisdiction established among themselves, a jurisdiction competent to decide upon questions of this nature with peculiar advantage and with sufficient authority. It would therefore have been a matter of grave consideration with me, if the question had been brought in the ordinary way and without any such recommendation; whether it would not have been referred more conveniently to that tribunal to which I have alluded; for I cannot but be sensitive that in applying the general principles of the law of marriage to this case, I may be adopting rules that are not duly founded, and which may prove highly inexpedient."

The case of *Roberts* v. *Brennan* (2) relied upon against us was undefended and unargued, and is not therefore a compelling decision. That a case similar to the present one was in the mind of Lord Haldane when delivering judgment in *Salvesen* v. *Administrator of Austrian Property* (3) is suggested by his language at p. 654 of the report in commenting on *Mitford* v. *Mitford*. (4) He there says: "In *Niboyet* v. *Niboyet* (5), in which the judgment of the majority of the

(1) (1795) 1 Hagg. Con. 216.
(2) [1902] P. 143.
(3) [1927] A. C. 641.
(4) [1923] P. 130.
(5) (1878) 4 P. D. 1.

Court is no longer law, Brett L.J., in the dissenting judgment which he delivered, observed that the Court of the domicil was the only Court that was entitled to alter the status of married people; but he went on to indicate that the principle, while it applies so as to include suits for judicial separation and for restitution of conjugal rights, did not apply to suits for a declaration of nullity. He gives no reasons for saying this."

Cur. adv. vult.

Nov. 24. BATESON J. In my judgment the respondent succeeds. The petition in this case dated August 1, 1930, states that the petitioner went through a form or ceremony of marriage with the respondent on March 21, 1929, in London, that the respondent was and has ever since been incapable of consummating the said marriage, that the respondent is domiciled in Scotland and resides in London and Castle Wemyss in the County of Renfrew; that the petitioner is domiciled in Scotland and resides in Hampstead. To that petition the respondent entered an appearance on August 20, 1930, under protest on the ground that this Court has no jurisdiction.

On August 25, 1930, the respondent took out a summons to dismiss the petition on the ground that this Court has no jurisdiction. On October 21, 1930, the respondent took out another summons to dismiss a petition for alimony pendente lite filed by the petitioner on the same ground. Both summonses were adjourned into Court for argument. At the close of the argument on behalf of the respondent a technical objection was raised on behalf of the petitioner but afterwards withdrawn, that the provisions of Divorce Rule 16 (B) (1) had

(1) Divorce Rule 16 (B): "The appearance may be under protest or limited to any proceeding in the cause in respect of which the party shall have received notice to appear. Provided that (*a*) Any appearance under protest shall state concisely the grounds of protest, and (*b*) the party appearing under protest shall forthwith proceed by summons to obtain Directions as to the determination of the question or questions arising by reason of such limited appearance and in default of so proceeding shall be deemed to have entered an unconditional appearance. Directions to be given upon an appearance under protest may provide for the trial of a preliminary issue with or without stay of proceedings in the cause or for determination of the matters in question at the hearing of the cause."

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not been complied with. The respondent, however, formally took out a summons for directions there and then, and I made an order that the issue raised by the protest should be tried forthwith.

Assuming the facts stated in the petition to be true the question I then have to determine is this. Has this Court jurisdiction to try a suit for nullity on the ground of impotence when the parties are domiciled abroad ? The respondent says that the Court of the domicil has exclusive jurisdiction. The petitioner says that the parties reside in England and were married in England and that in such cases this Court and the Ecclesiastical Courts before it have always exercised jurisdiction.

The argument for the petitioner is this :—

Inasmuch as the Ecclesiastical Courts always had jurisdiction in nullity cases where the parties were resident within their jurisdiction and the old jurisdiction was transferred to the High Court by the Act of 1857, now re-enacted by the Judicature (Consolidation) Act, 1925, and as since 1857 this Court has always exercised jurisdiction over nullity cases when the parties were resident or married here, it follows that there is jurisdiction in this case. It is further argued that the Ecclesiastical Courts made no distinction in the kind of nullity, whether it was on the ground of impotence or that of want of formality or illegality ; the only essential to jurisdiction was residence in the jurisdiction, and after the Act of 1857 residence or marriage in the jurisdiction. The text-books and cases are said to support this argument, with the exception of the case of *Salvesen or von Lorang* v. *Administrator of Austrian Property* (1), which does not decide the point, and though it may contain dicta against the argument, these dicta are merely obiter. Counsel for the petitioner, however, has to admit that no case can be found in which the present question has been raised either before or since 1857.

(1) [1927] A. C. 641.

The argument for the respondent was this :—

A suit for nullity on the ground of impotence is quite different from other suits for nullity, e.g., on the ground of informality or illegality, such as bigamy, absence of parental consent, or some requirement in the ceremony. Nullity on the ground of impotence is a suit to avoid a marriage and is in essence a suit to dissolve it. The marriage is voidable and not void, as in other cases of nullity. The marriage remains a marriage until one of the spouses seeks to get rid of the tie. In other cases such as bigamy there has never been a marriage at all. Domicil of the parties, at any rate since 1895, has been an essential of jurisdiction in a suit to dissolve a marriage in divorce and must equally be so in a nullity suit to dissolve a marriage on the ground of impotence. Further the decree in a nullity suit on the ground of impotence is a decree affecting the status of the parties and is a judgment in rem just as a decree in a divorce suit affects their status and is a judgment in rem. The Court of the domicil is the only competent Court to grant a decree affecting status. No case can be found before 1857 or since in which the Court has been held to have jurisdiction in a suit for nullity on the ground of impotence when the parties are domiciled abroad. Further it has to be remembered that impotence is not always a ground for a decree of nullity. There may be cases where the impotence is curable or the parties estopped by conduct from setting it up : *G.* v. *M.* (1) In the case of curable impotence the period between marriage and cure, although one of impotence, is not enough on which to obtain a decree. Again the marriage cannot be impeached after the death of one of the spouses. Nullity for impotence is a matter in which the spouses alone are concerned. In other forms of nullity other parties are concerned, and may obtain the assistance of the Court for a finding of nullity.

This is the argument for the respondent, and in my judgment it is sound.

The marriage being voidable and not void and the decree affecting and involving an alteration of status and

(1) 10 A. C. 171.

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being a judgment in rem binding on all the world, there can be no jurisdiction in this Court unless the parties are domiciled in this country. It seems to me that if the principle is sound that in a suit for dissolution of marriage in divorce jurisdiction depends on domicil it must equally so depend in a suit for dissolution of marriage on the ground of impotence. To call it a suit for nullity does not alter its essential and real character of a suit for dissolution. That is a mere difference in form, as Sir James Hannen said in *Turner* v. *Thompson*. (1) The usual relief in the United States I understand from that case is dissolution and not nullity. The Lord President (Lord Clyde) in the Court below (*Administrator of Austrian Property* v. *Salvesen or von Lorang* (2)) says "impotency" may be justly described even in the law of Scotland "not as a bar to the constitution of marriage but only as a means of setting it aside or as a resolutive condition of the contract." Originally in a suit for dissolution for divorce it was thought that residence was enough : *Brodie* v. *Brodie*. (3) In 1872 the question as to the essentiality of domicil was raised in *Wilson* v. *Wilson* (4) but not determined, as it was held that the parties were in fact domiciled here. It was not until 1895 that the principle was established by a decision of the Privy Council that the domicil for the time being of the married pair affords the only true test of jurisdiction to dissolve their marriage : *Le Mesurier* v. *Le Mesurier*. (5)

But apart from principle it seems to me that the House of Lords, consisting of Lords Haldane, Dunedin, Phillimore, Blanesburgh and Warrington, in *Salvesen* v. *Administrator of Austrian Property* (6) have put the matter beyond doubt. In that case a domiciled Scotchman married a domiciled Austrian in Paris in 1897. They lived together in Wiesbaden till the war, when he fought in the Austrian army, and she lived in Switzerland till 1923. The Administrator of Austrian Property claimed the wife's movables in

(1) 13 P. D. 37, 40.
(2) 1926 S. C. 598, 616.
(3) (1861) 2 Sw. & Tr. 259.
(4) L. R. 2 P. & M. 435.
(5) [1895] A. C. 517, 540.
(6) [1927] A. C. 641.

Scotland as being the property of an Austrian. She then brought a suit for nullity of marriage in Wiesbaden (the Court of the domicil) on the ground of want of formality in the Paris marriage. The Austrian (Wiesbaden) Court declared the marriage null and void. The claim of the Administrator was rejected in the House of Lords on the ground that the Austrian decree was binding on the Courts of Scotland, as it was a decree in rem affecting the status of the parties. Lord Haldane says (1): "The real question is simply whether the Court of the domicil was competent to dispose conclusively and finally of the question before it. If so, it does not matter in law whether it had an exclusive jurisdiction. Had the question been one of divorce for adultery there could to-day have been no controversy as to the binding effect of the German decree. The status of married persons as dependent on divorce is a matter for which the Court of their domicil is the appropriate Court, and its decision is treated by our Courts as not only being valid but as conclusive. The case before us is, however, not one of dissolving an existing marriage but of deciding that no valid marriage ever took place. The marriage was declared by the Court of the domicil to have been void by reason of non-compliance with the formalities required by the law of France, where it was celebrated. If this was a judgment determining the status of the supposed husband and wife it may well be that it should be regarded as having been binding upon third parties as having been a judgment in rem. For what does status mean in this connection? Something more than a mere contractual relation between the parties to the contract of marriage." Speaking of the competence of the Court of the domicil to declare the marriage void and commenting on the fact that in *Niboyet* v. *Niboyet* (2) Brett L.J. gave no reasons for suggesting that the domiciliary test did not apply to suits for declaration of nullity, he says that the question that the Court had to decide was whether the German (Wiesbaden) Court was competent as against other Courts conclusively to declare the marriage void and

(1) [1927] A. C. 641, 652. (2) 4 P. D. 1.

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adds: "I am unable as matter of principle to see how its competence as the Court of the domicil can be successfully challenged, and if it was competent the decree brought the claim, even of the respondent who was not a party before it, to an end. For the decree did undoubtedly alter the status of the husband and wife. They ceased retrospectively to have been married people in the community of their country. For the purpose of the question raised that status must be taken to have been a res and the judgment was therefore one in rem." He apparently approves of the Lord President's quoted definition of the effect of impotency upon the contract of marriage. Lord Dunedin says that the judgment in a nullity case decrees either a status of marriage or a status of celibacy, and that a decree of nullity savours of a res just as much as a decree of divorce. In other words, the judgment in a nullity case is a judgment equivalent to a judgment in rem. Lord Phillimore agreed with Lords Haldane and Dunedin and says: "If the Court is a competent Court, still more if it is the only competent Court —and in my opinion the Wiesbaden Court was the only competent Court for these parties—its judgment must for the very reason of the thing be such a judgment as that described in *A.* v. *B.* (1), a definitive decree declaring a marriage void which should be universally binding and which should ascertain and determine the status of the parties once for all." That passage in Lord Phillimore's speech covers this case precisely. It is quite true that in *Salvesen* v. *Administrator of Austrian Property* the question they were discussing was whether a judgment in a foreign Court was binding here, but it was necessary for the decision that they should find that it was a judgment in rem, and that it did affect status for the purpose of their conclusion. The whole Court decided that it was a judgment in rem, that status was affected, and that the judgment of the Court of the domicil was conclusive. Lord Phillimore went further and said that it was the only competent Court for those parties; that was the Court of their domicil. It is to be noted that Lord Dunedin

(1) (1868) L. R. 1 P. & M. 559, 561.

and Lord Warrington expressly agree with Lord Phillimore's speech. They said so in terms.

I ought to refer to the authorities which were cited in argument. I can get no assistance from those before 1857. Neither *Scrimshire* v. *Scrimshire* (1); *Sinclair* v. *Sinclair* (2); nor *Dalrymple* v. *Dalrymple* (3) were suits for nullity, and no question of jurisdiction arose. *Greenstreet* v. *Cumyns* (4) was a nullity case, as also *Pollard* v. *Wyburn* (5), but no question of jurisdiction arose in either. In *Lindo* v. *Belisario* (6), which Sir William Scott tried by the direction of the Lord Chancellor (Lord Loughborough), the learned judge doubted the jurisdiction to entertain a case of jactitation of marriage when the marriage was a Jewish one of apparently English Jews. In Shelford's Law of Marriage and Divorce (1841) it is stated at p. 130 that the Ecclesiastical Court had "complete jurisdiction in all cases whatever to decide with reference to the marriage of English subjects wherever celebrated," and "The Ecclesiastical Court also examines questions of foreign marriages in cases of British subjects, and sometimes of aliens; and it does this from necessity, in order to prevent a failure of justice." This passage, I think, only relates to the examination, whether the contract is in accordance with the foreign law, as in *Sinclair* v. *Sinclair* (2); *Scrimshire* v. *Scrimshire* (1) or *Lindo* v. *Belisario* (6), from where these words come. At p. 486 Shelford says that in matrimonial causes the power of the Court is in personam and depends upon the locality of the persons cited. The Court has jurisdiction to try the validity of a marriage wherever it may have been contracted. At p. 753 he states that a then modern author (Burge) had submitted that the appropriate law by which the dissolubility of marriage is to be determined is that of the actual domicil. From these materials I deduce that the Ecclesiastical Courts did in fact exercise jurisdiction in suits of nullity for impotence when the parties resided in England if they were English and came

(1) (1752) 2 Hagg. Con. 395.
(2) 1 Hagg. Con. 294.
(3) 2 Hagg. Con. 54.
(4) (1812) (sub *Briggs* v. *Morgan* (1820)) 2 Hagg. Con. 324, 332.
(5) (1828) 1 Hagg. Ecc. 725.
(6) 1 Hagg. Con. 216.

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within the limits of the jurisdiction of the Court. It also exercised jurisdiction to examine the terms of a contract made abroad by English subjects and test its validity as a contract or even the contracts of aliens from necessity and to prevent a failure of justice. No question arises here as to the terms of the marriage contract or its validity as a contract, nor as to failure of justice when the Scottish Court is available, though I am told that in Scotland the petitioner could not get alimony pendente lite and could have got it here. The Ecclesiastical Court only exercised jurisdiction in personam. Whether it would have exercised jurisdiction in cases of nullity for impotence over aliens with or without objection to the jurisdiction is left in doubt. No case can be found where it did. Even if it could be said that it did exercise jurisdiction in such a case or at any rate would have asserted it in case of need, counsel for the respondent argues that the law has advanced since those days, and as in divorce domicil gradually became essential, so it should in nullity for impotence.

As to the authorities since the Act of 1857, still I find no case on the point. The best cases which counsel for the petitioner can find refer to questions as to the marriage in question being a marriage at all by our own or foreign law or the jurisdiction has not been questioned or the cases have been undefended. The cases most relied on have not always been received in the highest tribunals with enthusiasm, and their reputation has not increased with age. *Simonin* v. *Mallac* (1) was a case where the parties were domiciled French people who were (never) married in England, but there was an absence of some formality required by French law. The woman sued for nullity in the French Court, where it was undefended, and she got a decree for nullity in the Court of the domicil. Then the woman came to England and petitioned for nullity here. The citation being served upon the husband in Naples, he did not appear or contest the suit. Sir Cresswell Cresswell said: "The responsibility cast upon the Court is greatly increased by

(1) 2 Sw. & Tr. 67, 74.

want of assistance in the argument on the (respondent's) side." It was held that there was jurisdiction to determine the validity of the contract, because the contract was entered into in this country. The contract, was a valid marriage by our law. If this case purports to decide more than that it is contrary to the decision of the House of Lords in *Salvesen* v. *Administrator of Austrian Property*. (1) It is true that the status of the parties as affecting the making of the contract of marriage is referred to there, but not the status of the parties as affected by the marriage. That was a case not of impotence, nor was the question of jurisdiction fought, so it cannot be of very much assistance. *Simonin* v. *Mallac* (2) was explained in *Brook* v. *Brook* (3), in which case Lord Campbell L.C. pointed out the distinction between the forms of entering into a contract of marriage governed by the lex loci and its essentials as depending on the lex domicilii and was commented on in *Sottomayer* v. *de Barros* (4) by James, Baggallay and Cotton L.JJ., where it was pointed out that consent must be considered part of the ceremony of marriage and not a matter affecting the personal capacity of the parties to contract marriage. *Sottomayer* v. *de Barros* was not a case of impotence and no question of jurisdiction arose. In the case as first reported (4) the question determined as a matter of law was whether a marriage between Portuguese subjects domiciled in Portugal who were first cousins, which is contrary to the law of Portugal, was a good or bad marriage. It was held that it was void, because by the law of the domicil it was void. When the facts were gone into (5) before Sir James Hannen he held that the husband was domiciled here, and the marriage was lawful because it was a perfectly good marriage in this country. The case is interesting, as on both trials the law of the domicil as ascertained prevailed. *Linke* v. *Van Aerde* (6) was a case of nullity for bigamy. The judgment was fortified by *Simonin* v. *Mallac* (2); *Sottomayer* v. *de Barros* (4); and

(1) [1927] A. C. 641.
(2) 2 Sw. & Tr. 67.
(3) 9 H. L. C. 193, 207.
(4) (1877) 3 P. D. 1.
(5) (1879) 5 P. D. 94.
(6) (1894) 10 Times L. R. 426.

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Niboyet v. *Niboyet* (1), a case since overruled. *Roberts* v. *Brennan* (2) was an undefended case of nullity for bigamy, and residence was held sufficient to found jurisdiction. The marriage was in the Isle of Man and the domicil Irish. The decision does not assist me in an impotence case. In *Ogden* v. *Ogden* (3) the marriage was English. The domicil of the man was French, that of the wife originally English. The French Court annulled the marriage for irregularity and the man married again in France. The woman petitioned for divorce in England and Sir Francis Jeune held that there was no jurisdiction, presumably on the ground that she was a domiciled Frenchwoman. The woman married again in England, and her second husband petitioned for nullity for bigamy. The marriage was held bigamous following *Simonin* v. *Mallac* (4) and *Sottomayer* v. *de Barros.* (5) It is difficult to reconcile this case with *Salvesen* v. *Administrator of Austrian Property* (6), as the French decree of nullity was conclusive and the decision of Sir Francis Jeune on the question of jurisdiction was more wrong than was suggested even in the Court of Appeal. In truth bigamy cases help very little, as in them as distinct from this there never has been a marriage, and the argument that there is no distinction or difference between the two classes of cases seems to me untenable. *Chetti* v. *Chetti* (7) was a case of desertion and there was no question of jurisdiction. A domiciled Indian was married to an English woman here, and it was held that he was not permitted to assert his own personal incapacity due to caste. In *Mitford* v. *Mitford* (8) the husband was a domiciled Englishman and the woman German. The ceremony, which was in Berlin, was valid by German but not by English law. The wife petitioned and obtained a decree of nullity in Germany on a ground unknown to English law. The husband appeared in the proceedings, contested them, and appealed. The

(1) 4 P. D. 1.
(2) [1902] P. 143.
(3) [1908] P. 46.
(4) 2 Sw. & Tr. 67.
(5) 3 P. D. 1.
(6) [1927] A. C. 641.
(7) [1909] P. 67, 87.
(8) [1923] P. 130.

wife married again in Germany. The husband then petitioned for divorce here on the ground that the first marriage was good by English law. One of the questions was: had the Berlin Court jurisdiction? As the man appeared and submitted to it, there could not be much doubt about that, and the German Court having held that there was no marriage according to German law, it was held that there was no marriage at the commencement of the suit. I do not think that assists in this case in any way.

Dicey (4th ed., p. 302) says that the Court has jurisdiction to entertain a suit for the declaration of nullity of an existing marriage: (1.) where it was celebrated here; (2.) where the respondent is resident here; and (3.) where the parties are domiciled here. But none of the authorities quoted deal with a case like the present. On (1.) he cites *Simonin* v. *Mallac* (1) and *Sottomayer* v. *de Barros* (2) (omitting, however, to notice that the husband's domicil was held in that case to be English) and *Niboyet* v. *Niboyet* (3), since overruled. If the intention is only to refer to forms as distinct from essentials the statement may be correct.

As to proposition (2.) he cites no authority. But he does assert that the wife must be held to have the domicil of her husband in every case at any rate when the marriage is voidable, e.g., on the ground of impotency. He also says at p. 306: "The exercise of jurisdiction on the score of domicil appears specially justifiable, when it is remembered that status is often dependent on a decree in a nullity suit and the Court of the domicil is obviously the best qualified to pronounce a decree affecting status."

Counsel for the petitioner contends that there is no ground for distinguishing one class of nullity from another, but I think that I have pointed out several distinctions, the greatest of which is the one being void and the other being voidable and not always voidable. He says that the former Courts always tried cases of nullity for impotence. That is true. The cases of nullity which the Ecclesiastical

(1) 2 Sw. & Tr. 67. (2) 3 P. D. 1.

(3) 4 P. D. 1.

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Courts always tried no doubt included cases of impotence, and the impossibility of dissolving a marriage by them was got over by calling it nullity when in essence it was dissolution, but a case involving aliens cannot be found. With the argument that I am bound by *Simonin* v. *Mallac* (1); *Mitford* v. *Mitford* (2); and *Ogden* v. *Ogden* (3) I do not agree, especially after what has been said about these cases in the decision in *Salvesen* v. *Administrator of Austrian Property* (4) quite apart from the dicta in that case. It is further contended that in divorce decrees the children are legitimate, but in nullity cases on the ground of informality illegitimate. In the one case the marriage is dissolved at the date of the decree absolute, in the other it is annulled ab initio. This leaves the case of nullity for impotence in a class by itself, and what the effect upon legitimacy is of the wife being potent who has a child before the nullity proceedings commence may be a very interesting question, especially having regard to *Russell* v. *Russell* (5) in the House of Lords. In my view it is also much more expedient to have the certainty of one Court and one Court only giving judgments in rem deciding the question of status of married persons.

In *Wilson* v. *Wilson* (6) Lord Penzance said: "It is both just and reasonable therefore that the differences of married people should be adjusted in accordance with the laws of the community to which they belong, and dealt with by the tribunals which alone can administer those laws. An honest adherence to this principle, moreover, will preclude the scandal which arises when a man and woman are held to be man and wife in one country and strangers in another."

Judgment for the respondent on the issue. Both petitions dismissed.

Solicitors for the petitioner: *Dawson & Co.*

Solicitors for the respondent: *Armitage, Chapple & Co.*

(1) 2 Sw. & Tr. 67.
(2) [1923] P. 130.
(3) [1908] P. 46.
(4) [1927] A. C. 641.
(5) [1924] A. C. 687.
(6) L. R. 2 P. & M. 435, 442.

R. M. M.

THE ESKBRIDGE.

1931
Jan. 12.

Shipping—Jurisdiction—Action in rem for Freight—Shipowners domiciled in England—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 22, *sub-s.* 1 (*a*) (*xii.*).

The plaintiffs, shipowners domiciled in England, instituted an action in rem against cargo owners for freight in respect of the carriage of the cargo in the ship.

By s. 22, sub-s. 1 (*a*) (xii.), of the Supreme Court of Judicature (Consolidation) Act, 1925, the High Court shall in Admiralty matters have jurisdiction in respect of any claim arising out of an agreement relating to the carriage of goods in a ship, "unless it is shown to the Court that at the time of the institution of the proceedings any owner or part owner of the ship was domiciled in England":—

Held, that although under the section plaintiffs who are British shipowners domiciled in this country are in a less favourable position than foreign shipowners, the section was general in its scope and could not be construed as applicable only to defendant shipowners against whom a claim is made, and that the Court had no jurisdiction to entertain the action.

Motion by the defendants to set aside the writ in an action in rem for freight brought by the North of England Steamship Company, Ld., owners of the steamship *Eskbridge*, against "the owners of 480 quarters of wheat ex the steamship *Eskbridge*."

The *Eskbridge*, a steamship owned by the plaintiffs, a company registered in England, carried from Leningrad to Hull a cargo of grain in bulk. On its arrival at Hull neither the consignees, the Russo-British Grain Export Company, nor their assigns had received the bills of lading, and therefore were unable to take delivery of the cargo, and the wheat, 5410 tons, was discharged and stored with the London and North Eastern Railway Company. On November 26, 1930, cheques for 3200*l.* were tendered to the plaintiffs in respect of freight and insurance, but disputes arose between the parties and the plaintiffs declined to release the wheat from the railway company's warehouse. On November 27 the Russo-British Grain Export Company issued a writ against the plaintiffs claiming (inter alia) the return of the proceeds of

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the cheques. On December 2 the plaintiffs issued the writ in rem, the subject of the present motion, claiming as owners of the steamship *Eskbridge*: "(1.) 338*l.* 13*s.* 3*d.*, being freight and insurance due in respect of the carriage of the said cargo [480 quarters] arising out of an agreement relating to the use or hire of the said steamship; (2.) expenses of storage and realisation and costs." The 480 quarters was taken as representing the quantity of wheat on which freight and expenses would amount to 338*l.* 13*s.* 3*d.*, the balance of the sum which the plaintiffs alleged was due to them. The wheat was stored in bulk, and service of the writ was effected by inserting a copy in a parcel which in fact consisted of 1004 quarters. No application was made for a warrant of arrest. On December 8 the parties came to terms and the bill of lading holders took delivery of the wheat, but the question remained as to the responsibility for the costs incurred by the plaintiff shipowners.

The defendants, who had entered an appearance under protest, moved for an order to set aside the writ, with costs, on the ground that the Admiralty Division of the High Court had no jurisdiction to entertain such a suit in rem brought by shipowners domiciled in this country.

Cyril Miller for the defendants in support of the motion. The ancient jurisdiction of the Admiralty Court did not extend to claims in respect of freight, and, until 1920, when provision was made by s. 5 of the Administration of Justice Act of that year (a section now incorporated in s. 22 of the Judicature (Consolidation) Act, 1925), there was no right to proceed in rem in the Admiralty Division for freight. The plaintiffs therefore must bring themselves within the provision of s. 22, which applies only if the shipowners are not domiciled in England: see *The Sheaf Brook* (1); and, see also *Cargo ex Argos*. (2) Both on this ground therefore and on the subsidiary ground that service on an unidentified portion of a bulk cargo is not an effective service of a writ in rem, the writ should be set aside with costs against the plaintiffs.

(1) [1926] P. 61.

(2) (1873) L. R. 5 P. C. 134, 148.

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Sir Robert Aske for the plaintiffs. The Legislature must have intended the limitation in s. 22 to apply only to defendant shipowners. To read the section otherwise would be to confer a benefit on foreign shipowners and to withhold it from British shipowners. The wording of s. 6 of the old Admiralty Court Act of 1861 (since repealed) shows that a limitation as to domicil was inserted because in the case of a defendant who was a British shipowner domiciled in this country it was unnecessary to give a plaintiff the benefit of an action in rem. That section provided that the High Court of Admiralty should have jurisdiction over "any claim by the owner . . . . of any bill of lading of any goods carried into any port in England or Wales in any ship . . . . unless it is shown to the satisfaction of the Court that at the time of the institution of the cause any owner or part-owner of the ship is domiciled in England or Wales."

Atkin L.J. in *The Sheaf Brook* (1), in considering s. 22, sub-s. 1 (*a*) (xii.), said that it was plain that the statute "has laid it down in terms that such actions are not to be tried in the Admiralty Division because the defendant is domiciled in this country and has got the right to have his liabilities determined by the ordinary tribunals." Further, s. 6 of the Administration of Justice Act, 1928, provides that all jurisdiction vested in the High Court under the Judicature (Consolidation) Act, 1925, shall belong to all the Divisions alike (2), and by s. 33, sub-s. 2, of the latter Act the Admiralty jurisdiction of the High Court may be exercised either in proceedings in rem or in personam.

[THE PRESIDENT. This action was in rem. Has there been an effective service of the writ? Have you not merely an unidentified parcel of grain?]

The railway company, in discharging the grain, had undertaken to leave to the last the parcel in which the writ had

(1) [1926] P. 61, 70.

(2) The Administration of Justice Act, 1928 (18 & 19 Geo. 5, c. 26), by s. 6, "general amendments of 15 & 16 Geo. 5, c. 49," provides that "The following sub-section shall be inserted at the end of Section four of the principal Act:

"(4) Without prejudice to the provisions of this Act relating to the distribution of business in the High Court, all jurisdiction vested in the High Court under this Act shall belong to all the Divisions alike."

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been inserted, so that it was to that extent identified and the whole of it belonged to the same owners.

[THE PRESIDENT. I am inclined to think you have brought the defendants before the Court.]

Cyril Miller in reply. In *The Sheaf Brook* (1) it was the defendants who were domiciled in England and the observations of Atkin L.J. were directed to those facts.

THE PRESIDENT (LORD MERRIVALE). This motion raises a point of considerable practical importance. The shipowners, a company registered in England and having their residence within this jurisdiction, brought to Hull from a Russian port a cargo of grain in bulk. The cargo was consigned to another English company. When the cargo arrived at Hull it was found that no bills of lading were available, and the owners of the cargo were not personally present to take delivery. So the cargo owners were in default and neither by themselves nor by their assignees were they in a position to take delivery. All the difficulties in the case have arisen out of that default. There were negotiations, and the assignees of the cargo, the English assignees, who had not at the time the bills of lading, proposed that the goods should be delivered on payment of a sum which did not amount to the whole freight and on the giving of a letter of indemnity to the shipowners. The shipowners' agents were minded to do business by way of agreement, but not to do business upon precisely the terms proposed, and the negotiations broke down. If it were material I should have been disposed to hold that no shipowner could be bound by such a contract as that which was alleged against the agents of the shipowners in respect of this cargo.

The matter being in that situation, on December 2, the shipowners issued a writ for freight amounting to 338*l.* odd, which they attributed to a certain parcel of cargo, and they identified that parcel of cargo as 480 quarters of wheat lying in a Hull warehouse. They were in this difficulty, that they had notice of the existence of alleged owners of cargo, but they had no bills of lading presented, and they had no owner

(1) [1926] P. 61, 70.

of the cargo within the jurisdiction who at that time was offering them the whole freight in exchange for delivery. They were also perhaps in some uncertainty as to the question who was in truth at the moment the person entitled to claim delivery of the bulk cargo. They accordingly came to the conclusion that they could effect service of their writ by identifying a parcel of the cargo, 480 quarters, and issuing the writ in rem against that parcel of the cargo, making that parcel the res. There was no specific parcel of 480 quarters, but they met that difficulty by conversation with a representative of the railway company, who said that if it would facilitate business they would take care that the residue of a parcel of the grain in a particular granary should not be released until the shipowners were settled with. There was a kind of notional proceeding by which the writ was taken to be served upon that res. Whether that was an effective service I need not finally determine. A few days afterwards the bills of lading arrived and the holders of the bills of lading, having by that time a complete title to the grain, claimed it, paid the freight and received the cargo.

The action commenced by the writ on December 2 was in the air. The business part of the transaction had been cleared up, but the writ was outstanding, and the question now remaining is, who shall pay the costs to which the shipowners have been put by reason of the delay in taking delivery of the cargo, owing to the bills of lading not being forthcoming. The argument addressed to me has been directed to ascertaining whether the defendants named in the writ, the owners of that parcel of cargo, who have now appeared and are identified as the owners, are liable for the costs of this action, or whether the costs must fall upon the shipowners, because —as suggested by the defendants—there was no jurisdiction which warranted the issue of a writ in rem in the Admiralty Division at the time when the writ was issued, and there was no High Court jurisdiction to deal with this claim.

That has been stoutly contested, and I feel the force of the argument addressed to me by Sir Robert Aske as to the advantage there would be, apparently, in a practice where, as

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a matter of business, if an English shipowner, whose ship has come into an English port, does not find an owner of the cargo at the dock side ready at the proper time to receive it, he should be entitled to deal with the cargo and exact from its owner, by its sale if necessary, the amount due for freight. The question, however, is whether there is jurisdiction to clear up the matter in the manner proposed by the plaintiffs. It is conceded that before 1920 there was in the High Court no power by which such steps as were taken here could rightfully be taken in the exercise of the jurisdiction of the Court. It is quite immaterial that in the county courts, under particular statutes, there is a limited power to deal with small matters in some such way. Therefore the real question in the case is whether the Administration of Justice Act, 1920, and the Supreme Court of Judicature (Consolidation) Act, 1925—in which the additional powers of the Act of 1920 are incorporated—give to the shipowners in this case the right or power to take the proceedings which in fact they have taken.

The material section of the Act of 1925 is s. 22, sub-s. 1 (*a*) (xii.). That provides that the High Court shall in Admiralty matters have jurisdiction in respect of any claim arising out of an agreement relating to the carriage of goods in a ship "unless it is shown to the court that at the time of the institution of the proceedings any owner or part owner of the ship was domiciled in England." It is admitted that the owners of this ship, being an English company, were domiciled in England, and this section provides that the jurisdiction of the High Court shall be jurisdiction in respect of claims relating to the carriage of goods in a ship, unless the shipowners—these present plaintiffs—are at the material time domiciled in England. When the matter is put in that way it seems to me clear that the limited jurisdiction given by the statute of 1920, incorporated in the Consolidation Act of 1925, does not extend to the present case.

Sir Robert Aske very persuasively presented the case of the plaintiffs. He pointed out its great hardship. First, he said that they ought to be at least as well off as plaintiffs not domiciled in this country. Why, he asked, should English

shipowners be at a disadvantage compared with alien shipowners ? It is not the function of this Court to answer that question, but if it were I could enumerate many reasons why it might be thought that foreign owners of a ship brought here under a contract, who had not the advantages possessed by persons domiciled within the jurisdiction, should be given facilities for clearing up business which were not necessary in the case of a shipowner domiciled here. I am not persuaded by the argument ab inconvenientia. Then it is said that one must construe these powers under the Act of 1920, incorporated in the Act of 1925, with due regard to the provisions of the Admiralty Court Act, 1861. What that Act provided by s. 6 was that an owner or consignee or assignee of goods carried into any port in England or Wales in any ship might proceed under the Admiralty jurisdiction in respect of damage done to the goods or any part thereof by negligence or breach of the contract of carriage, unless it were shown to the satisfaction of the Court that at the time of the institution of the cause any owner or part owner of the ship was domiciled in England or Wales. It is damage done by the ship. It relates to a totally different matter. It gives the owner of goods a right to proceed in rem where he is not able to proceed in personam. It does not seem to me that the provision in the Act of 1861 has any real bearing on this case.

The last point was that there has been a decision in *The Sheaf Brook* (1), where, if one gives the widest possible interpretation to some of the wording of the judgments in the Court of Appeal one might spell out of them a meaning of the section in question which that section would not otherwise have. Judgments, as well as statutes, must be construed with regard to the subject-matter under consideration, and when I construe the judgments in *The Sheaf Brook* (1) with regard to the position in which this case stands I do not find that it really helps me. At any rate it does not help the plaintiffs to sustain the argument which has been presented on their behalf.

1) [1926] P. 61.

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I hold that this writ is outside the jurisdiction of the Court and must be set aside. There can be no further proceedings upon it, except that the plaintiffs—though I sympathize with them—must bear the costs to which they have put the defendants.

Solicitors for plaintiffs: *Botterell & Roche, for Botterell, Roche & Temperley, West Hartlepool.*

Solicitors for defendants: *Pritchard & Sons, for Andrew M. Jackson & Co., Hull.*

E. C. M. T.

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March 25.

THE RING.

Shipping—Practice—Solicitors' Undertaking to appear and give Bail—Damage to Cargo—Delay in issuing Writ—Ship sold—Binding Effect of Undertaking.

In June, 1930, a firm of Norwegian shipowners, being threatened with an action in rem by cargo owners in respect of damage and short delivery, to avoid arrest of the ship, instructed their solicitors to give an undertaking to accept service, appear and provide bail. No writ was issued, the ship left the jurisdiction, and when she returned several months later she was encumbered with liens. On January 6, 1931, she was sold by order of the Court. On March 2 the solicitors took out an originating summons, and moved the Court for an order that they were no longer bound by their undertaking. On March 14 the cargo owners issued their writ in rem, but the solicitors refused to accept service pending the hearing of the motion:—

Held, that the undertaking, which was plain in its terms, enabled the ship to leave the jurisdiction without being arrested, and that the fact that she was subsequently sold was immaterial; that there had not been undue delay in issuing the writ having regard to all the circumstances; and that the solicitors remained bound by their undertaking.

MOTION on an originating summons issued by solicitors, who sought to be relieved of their undertaking to accept, in an action by cargo owners, service of the writ, to appear and to put in bail.

In June, 1930, the *Ring*, a Norwegian steamship, arrived in the Mersey with a cargo of timber from Riga. There was

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alleged to be some damage to or loss of cargo during the voyage, and Messrs. Weightman, Pedder & Co., solicitors, of Liverpool, acting for cargo owners, gave notice of a claim against the shipowners. On June 5 Messrs. Ince, Roscoe, Wilson & Glover, solicitors for the owners of the *Ring*, by telegram gave an undertaking in the following terms: "*Ring*. Please accept this telegram undertaking accept service, appear, provide bail on behalf of *Ring* in amount not exceeding statutory limit or her present value whichever may be less."

No writ was at that time issued on behalf of the cargo owners, and on June 12 the *Ring* left the jurisdiction. In October the ship returned to this country, and actions were brought and judgments obtained against her by necessaries, men, wages claimants, and mortgagees, in consequence of which on January 7, 1931, she was sold under an order of the Court.

In these circumstances, on March 2, Messrs. Ince & Co. issued the originating summons for the purpose of obtaining relief from their undertaking. On March 14 the cargo owners issued a writ in rem against the owners of the *Ring*. The writ was served on Messrs. Ince & Co., but they refused to accept service pending the hearing of the present motion.

Willmer for the applicants. There is no maritime lien in respect of a claim for short delivery and damage to cargo, and, as the ship has been sold, the cargo owners cannot now bring an action in rem. The solicitors' undertaking is collateral; a writ must be issued forthwith. If no writ is issued there is no consideration for the undertaking, which is given in order that the vessel may not be arrested, and until a writ in rem has been issued the res is not subject to arrest. If the solicitors' telegram constituted an offer it can be withdrawn at any time before acceptance, and it is accepted by the issue of the writ. The same principles should apply to a solicitor's undertaking as to a caveat against arrest which can be withdrawn at any time. A reasonable time for the issue of the writ is before the ship leaves the

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jurisdiction. In *In re Kerly, Son & Verden* (1) Stirling L.J. said that "delay . . . . is a circumstance which the Court has to take into consideration." In that case and in *The Borre* (2) and *The Gertrud* (3) the solicitors were held bound by their undertaking, but in each case the writ had already been issued before any attempt to obtain relief from the undertaking had been made, and the circumstances were entirely different.

Sir Robert Aske for the respondents. The object of the solicitors' undertaking is to enable the ship to go, and it could hardly be argued that if the ship went and was sunk almost immediately a writ could not then be issued, or that the solicitors would not be bound to accept service of it and put in bail. The only limitation in point of time, once the undertaking has been given, is the ordinary limitation of six years. To give effect to the applicant's contention words must be read into the undertaking which are not there. Although the facts are different, both *In re Kerly, Son & Verden* (4) and *The Borre* (2) are in the respondents' favour, for they show what a binding effect the Court has given to these undertakings. The respondents were not in fact aware that the ship had been sold until they were so informed on the hearing of the present motion, and if need be they can issue a writ in personam.

[BATESON J. You cannot get bail in an action in personam, but the real question here is what the words of the undertaking mean.]

Willmer replied.

BATESON J. The *Ring* brought a timber cargo from Riga in June, 1930, for Manchester and Warrington, and the cargo owners, thinking they had some claim against the ship for damage and short delivery, were threatening, apparently, to arrest her. They communicated with Messrs. Weightman, Pedder & Co., their solicitors; the latter in turn communicated with Messrs. Ince, Roscoe, Wilson & Glover, the present applicants, who, fearing arrest,

(1) [1901] 1 Ch. 467, 479.
(2) [1921] P. 390.
(3) (1927) 17 Asp. M. L. C. 343.
(4) [1901] 1 Ch. 467.

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telegraphed to Messrs. Weightman, Pedder & Co.: "*Ring.* Please accept this telegram undertaking accept service, appear, provide bail on behalf of *Ring* . . . ." That was on June 5. Messrs. Weightman, Pedder & Co. acknowledged receipt of the telegram, but no writ was issued. On June 12 the *Ring* left the jurisdiction, and correspondence between the solicitors ceased for a time. On December 29 a letter was sent by Messrs. Weightman, Pedder & Co. to Messrs. Ince informing them about the cargo and that a general average statement of the various claims had been made, and adding: "We are now in a position to inform you of the amount of bail required." Messrs. Ince & Co. acknowledged that letter on December 30, and said that they would have to take their clients' instructions as to whether the undertaking was still to hold good. The ship in fact was sold on January 7, 1931, under an order of the Court in some other proceedings.

On March 2 Messrs. Ince & Co. issued the originating summons in this case for the determination of the following question: "Whether Messrs. Ince & Co. are still bound by the undertaking to accept service, appear, and provide bail on behalf of the *Ring* given by them to the defendants' solicitors on June 5, 1930."

I think Messrs. Ince & Co. are bound by that undertaking. It is in terms quite plain, i.e. an undertaking to accept service. The point is taken that no writ was issued for many months and that they are not now bound to accept service. Now, it is quite clear that if the writ had been issued at the time they would have been bound to accept it. Does the fact that the writ was not then issued make any difference? I think not. The point Mr. Willmer so skilfully took does not appeal to me. He says that the owners of the cargo cannot now bring an action in rem, because the ship has been sold. That may be true, but I do not think it makes any difference, for the shipowners through their solicitors have undertaken to accept service of the writ, appear, and provide bail. It is said that the contract is collateral, on the one side to issue the writ, and on the other side to give the undertaking, but I do not so

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read the contract. In his affidavit Mr. Ernest Wilson, a member of the firm of Messrs. Ince & Co., says that he always understood it to be the practice of solicitors in the Admiralty Division, when an undertaking is given, to commence proceedings at once or while the vessel is still within the jurisdiction of the Court. He does not say that the writ must be issued before the undertaking is given, but only while the vessel is within the jurisdiction. He also submits that the issue of the writ is essential directly the undertaking is obtained, showing that in his opinion, with which I agree, it is not necessary for the writ to be in existence. I see that in the affidavit of the managing clerk for Messrs. Weightman & Co. he says that his view is not quite the same as Mr. Wilson's. He says he has known many cases in his own personal experience in which the writ has not been issued until the vessel has left the jurisdiction, and, indeed, that it is not uncommon for solicitors' undertakings to be limited in point of time. I am satisfied that there is no necessity for the writ to be actually in existence, although in most cases, no doubt, it is issued forthwith. The real bargain, as I understand it, is that the solicitor gives the undertaking that he will accept service when the writ is issued, appear, and give bail, in consideration that the ship shall not be arrested, but shall be allowed to sail as soon as she pleases. In the case of a foreign ship it is important that she shall not try to avoid service. The fact that in this case the ship got into difficulties and had to be sold makes no difference to the contract I have to construe.

It was further argued that the undertaking is similar to a caveat against arrest, which can be withdrawn at any time. But the solicitors did not withdraw their undertaking in this case, and I do not think they could have done so, for they gave it for good consideration to get the ship freed from the risk of arrest. To withdraw a caveat is not the same thing; the ship must be in this country.

Mr. Willmer's final contention was that the writ must be issued within a reasonable time. Having regard to the evidence connected with this ship I cannot say that a wait

of some nine months was an unreasonable time. The mere putting of the writ on the file does not seem to me to be a serious matter, for nothing could have been done under it until it was known what was the exact position as regards the cargo and an average statement had been made up. I cannot grant the application on this originating summons, and the motion will be dismissed with costs. Leave to appeal.

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Solicitors for the applicant: *Ince, Roscoe, Wilson & Glover.*
Solicitors for the respondents: *Botterell & Roche, for Weightman, Pedder & Co., Liverpool.*

E. C. M. T.

L. *v.* L.

1931

Feb. 11.

Divorce—Deed of Separation—Covenant not to plead Adultery committed before the Date of the Deed—Counter-charge against Petitioner of Adultery committed before Date of Deed—Public Policy—Purpose of Deed—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 178, *sub-s.* 3. (1)

By a separation deed executed by spouses who were then parties to a suit for judicial separation on the ground of the cruelty of the husband it was agreed that neither of them should sue the other for any misconduct which had theretofore taken place, and the deed further stipulated that any offence that either of them had committed should be forgiven or condoned, and that in case either of them should take

(1) 15 & 16 Geo. 5, c. 49, s. 178, sub-s. 3: "If the Court is satisfied on the evidence that the case for the petition has been proved and does not find that the petitioner has in any manner been accessory to or connived at or condoned the adultery or that the petition is presented or prosecuted in collusion with either of the respondents, the Court shall pronounce a decree of divorce:

Provided that the Court shall not be bound to pronounce a decree of divorce if it finds that the petitioner has during the marriage been guilty of adultery, or if in the opinion of the Court he has been guilty:—

(*a*) of unreasonable delay in presenting or prosecuting the petition; or

(*b*) of cruelty towards the other party to the marriage; or

(*c*) of having without reasonable excuse deserted, or having without reasonable excuse wilfully separated himself or herself from, the other party before the adultery complained of; or

(*d*) of such wilful neglect or misconduct as has conduced to the adultery."

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proceedings against the other in respect of any complaint thereafter arising no offence antecedent to the deed should be pleaded or alleged by either or be admissible in evidence

The wife subsequently sued the husband for dissolution of marriage on the ground of his adultery alleged to have been committed since the date of the deed. The husband traversed the allegation, and by his answer countercharged the wife with adultery antecedent to the deed.

The wife disputed the right of the husband to make the countercharge, having regard to the deed. The husband contended that the provisions of the deed were against public policy, in that they provided for the withholding from the Court matters material and necessary for its consideration by virtue of the Judicature (Consolidation) Act, 1925, s. 178, sub-s. 3 :—

Held, on a motion by the wife to strike out the allegation in the answer of the husband of her adultery, that the deed was not against public policy, and that it did not constitute any bargain between the parties to pervert the course of justice by withholding from the Court any matter material for its consideration, and that the agreement made by the deed being one honestly entered into was good, and it was no answer to it to say that if the intention of the parties had been to obtain a collusive divorce or to cloak the past, the deed could have had a dishonest and illegal operation.

Rose v. *Rose* (1882) 7 P. D. 225 and *Rowley* v. *Rowley* (1866) L. R. 1 H. L. (Sc.) 63 followed.

Motion to strike out paragraphs of answer of respondent husband.

The parties were married on April 20, 1920. There were two children of the marriage. The wife having filed a petition for judicial separation on the ground of the alleged cruelty of the husband, a deed of separation was entered into on December 20, 1929, providing for the dismissal of the petition and the parties living apart. The deed contained (inter alia) the following clauses :—

Clause 4. "Neither of them the husband and the wife shall require or compel or endeavour to compel the other of them to cohabit or dwell with him or her by any legal proceedings for restitution of conjugal rights or otherwise howsoever or take any proceedings against the other of them to obtain a divorce or judicial separation in respect of any misconduct which has heretofore taken place or is alleged to have heretofore taken place on the part of the other of them."

Clause 5. "No proceedings shall be commenced or prosecuted by or on behalf of either party against the other in

respect of any cause of complaint which now exists or has arisen before the date of these presents and every offence (if any) which has been committed or permitted by either party against the other shall be considered as hereby forgiven and condoned and in case hereafter either shall commence or prosecute any proceedings against the other in respect of any cause of complaint which may hereafter arise no offence or misconduct which has been committed or permitted before the execution of these presents and no act deed neglect or default of either party in relation to any such offence or misconduct shall be pleaded or alleged by either party or be admissible in evidence."

On August 13, 1930, the wife commenced the present proceedings for dissolution of marriage, alleging the adultery of the husband since the date of the deed. By his answer the husband denied the charge of adultery against him and countercharged the wife with adultery with a man, since deceased, generally and during the year 1929, the last charge being before the date of the deed.

The wife took out a summons returnable before a judge seeking to have it determined whether the respondent was entitled to plead the adultery raised by his countercharge. This summons resulted in the present motion by the wife to strike out the paragraphs of the answer of the husband making the countercharge. The notice of motion specified as grounds: (1.) that the respondent was estopped by the deed of separation from pleading or alleging the adultery countercharged or seeking relief in respect thereof, and (2.) that the answer was embarrassing and vexatious.

Sir Patrick Hastings K.C. (*Hon. Victor Russell* with him) for the wife. The allegations of adultery in the answer of the husband refer to dates before the deed of separation and contravene the covenants of the deed. The deed has been a common form since the case of *Rose* v. *Rose*. (1) The contention of the husband may amount to this, that he has only to say that he did not know of the matrimonial

(1) 7 P. D. 225.

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offence at the date of the deed, and he will not then be bound by his covenant in the deed. The decision in *Rose* v. *Rose* (1) was affirmed by the Court of Appeal. (2) Jessel M.R. said: "As was pointed out in *Besant* v. *Wood* (3), unless a married woman was allowed to contract herself out of her rights in the Divorce Court, no proceedings in that Court could ever be compromised, but must be fought out to the end," and Lindley L.J., referring expressly to the argument before the Court of Appeal that such a covenant was against public policy, said: "I can see nothing in that objection when once the legality of deeds of separation has been established."

In *Rowley* v. *Rowley* (4) the petitioning wife undertook not to institute other proceedings in the Divorce Court, the existing proceedings being compromised by a deed of separation, and the Judge Ordinary (Sir James Wilde) on the petitioner filing a fresh petition and renewing the charges described that course as a "gross breach of good faith, and in violation of express agreement," and in the same case in the House of Lords (5) the Lord Chancellor said that it could hardly be supposed that the parties meant to leave it open to the wife to institute fresh proceedings upon unknown acts of adultery committed prior to the petition which might afterwards be discovered.

Norman Birkett K.C. (*T. Bucknill* with him) for the husband. The point was actually taken by counsel for the wife in *Rose* v. *Rose* (2) before the Court of Appeal in these words: "The . . . . covenant is void as against public policy, it is an agreement to keep back from the Court facts which would influence it in exercising the jurisdiction given to it" by the 20 & 21 Vict. c. 85 (Matrimonial Causes Act, 1857), s. 31, sub-s. 1 (referring to the discretionary power of the Court to withhold a decree). The principle of *Hyman* v. *Hyman* (6) should be applied, in which case it was held that the power of the Court (in that case to make provision for the wife) was a necessary incident of the power of the Court to dissolve a marriage, not merely in the interest of the wife, but of

(1) 7 P. D. 225.
(2) (1883) 8 P. D. 98, 99.
(3) (1879) 12 Ch. D. 605.
(4) (1864) 3 Sw. & Tr. 338.
(5) L. R. 1 H. L. (Sc.) 63.
(6) [1929] A. C. 601.

the public, and that the wife could not by her own covenant preclude herself from invoking the jurisdiction or preclude the Court from the exercise of its jurisdiction. So in this case she cannot preclude the Court from inquiring into antecedent matrimonial offences. *Rowley* v. *Rowley* (1) was decided by the House of Lords in 1866, and it does not follow that what was public policy then is that of to-day. The decision in *Rowley* v. *Rowley* (1) was on the meaning of the words of an undertaking. No words in a bargain can limit the statutory powers of the Court. What these powers are appears from the Supreme Court of Judicature (Consolidation) Act (15 & 16 Geo. 5, c. 49), s. 178, sub-s. 3, and in certain events it is provided that the Court shall dismiss the petition. There is a duty on the Court. The Court must know the facts in order to exercise its power, and if agreements are tolerated facts may be hidden from the Court. Parties must not be allowed to hide facts from the Court. That is against public policy. Concealment of facts involving the discretion of the Court to withhold a decree or the suppression of the name of the woman involved are within the same mischief. This deed is an instrument whereby the Court may be deceived and have matters kept from it which are essential to its decision. As was said by Cozens-Hardy M.R. in *Harriman* v. *Harriman* (2): "No admission . . . . however formal, can bind the Court. The public interest does not allow parties to obtain divorce by consent, and the analogy of ordinary actions cannot be applied."

Sir P. Hastings K.C. in reply.

THE PRESIDENT (LORD MERRIVALE). The parties in this case were married in 1920. Differences arose between them in 1929, and in respect of those differences the now petitioner was petitioner for a decree of judicial separation. I have that petition before me. Its terms have not been referred to. The discussion between the parties resulted in a separation agreement, which was embodied in a deed of December 20,

(1) L. R. 1 H. L. (Sc.) 63. (2) [1909] P. 123, 131.

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1929. It was agreed that the petition should be withdrawn, that the parties should live apart, and that there should be no annoyance of one by the other. By clause 4 it was agreed that neither of them should take any proceedings against the other of them, "to obtain a divorce or judicial separation in respect of any misconduct which has heretofore taken place, or is alleged to have heretofore taken place on the part of the other of them." Then by clause 5 it was further agreed that any offence which either of them had committed should be forgiven and condoned, and in case either should "commence or prosecute any proceedings against the other in respect of any cause or complaint which may hereafter arise, no offence or misconduct which has been committed or permitted before the execution of these presents and no act, deed, neglect or default of either party in relation to any such offence or misconduct shall be pleaded or alleged by either party or be admissible in evidence." So that there was what may be called a charter of oblivion and indemnity in very wide terms between these parties.

The parties lived apart. In August, 1930, the wife filed her petition in this suit, alleging adultery of her husband, and after the Vacation the respondent delivered his answer, denying the adultery, and alleging the adultery of the petitioner in August, 1929, and in September, 1929. There were communications between the parties with a view to raising before the Court not the question whether there was substance in the charges of either the one party or the other, but on the part of the wife whether, in face of the deed of separation of December, 1929, the respondent could be permitted to make the allegations which are embodied in his answer, and after communication between the parties it was agreed that the convenient way of raising that question was by a motion, which has now come on for argument, to strike out the paragraphs in the answer to which I have referred, on the ground of estoppel arising from the separation deed.

The matter has been fully argued, and as I have come to a definite view about it, I proceed to state what that view is.

The real question between the parties is whether the clauses

in the separation deed are valid clauses; that is, clauses which, assuming the deed to have been honestly concluded between the parties, are binding upon each of them. The petitioner's submission is that they are prima facie good, and that no cause is shown why they should not have effect. On behalf of the respondent it is contended that an agreement on the terms of the agreement here in question is void, as being against public policy. To put it concisely, what is said is that the jurisdiction in divorce arising under the Act of 1857 and the subsequent statutes is not a jurisdiction which relates only to the rights of the suitors, governing and affecting their status, but involves also considerations of public policy which arise by reason of the discretion vested in the Court and the law which governs the exercise of the discretion. It is to be said, as counsel for the husband conceded, that in the case of *Rose* v. *Rose* (1), a very well known case to those familiar with this jurisdiction, which came on for consideration before Sir James Hannen forty-nine years ago, and ultimately was dealt with in the Court of Appeal in 1883 (2), after argument it was held that a clause such as this was a good and binding clause between the parties. Also in the case of *Rowley* v. *Rowley* (3) in the House of Lords in 1866, where there had been proceedings on an agreement of oblivion, such as is set up here, and there was an attempt in subsequent proceedings to go behind that agreement, this Court and the House of Lords affirmed that the agreement was a conclusive bar against the allegation in any new proceedings of any matters alleged to have occurred before the date of the settlement between the parties. It has been said by counsel for the husband that there is no reference to public policy in the judgments of their Lordships, whose opinions are reported in the report of *Rowley* v. *Rowley*. (3) It is said that what was considered there was the effect of the language and whether, upon the plain terms of the language used, what was sought to be done in the new petition was an infringement of the covenant contained in the settlement between the

(1) 7 P. D. 225.

(2) 8 P. D. 98.

(3) L. R. 1 H. L. (Sc.) 63.

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parties. So, it is said, that at any rate it cannot be taken that the House of Lords decided upon the question of public policy which is raised here. But it is to be considered that Sir James Wilde, at that time Judge Ordinary, who was better known in more recent times as Lord Penzance, did in this Court (1) consider the question of public policy, and drew a distinction between matters in respect of which spouses might agree, and their agreements would be final and binding, and matters in respect of which agreements of spouses would not be final and binding. Sir James Wilde gave a judgment, which was affirmed in the House of Lords, whereby it was held that the agreement there in question was operative to exclude the setting up of those earlier charges. As to *Rose* v. *Rose* (2) it is not disputed that it is a case in point. That is a decision of the Court of Appeal. As to *Rowley* v. *Rowley* (3) it is said the matter is not determined there, and it is said that regard must be had also to various cases which have elaborated the effect of the discretionary jurisdiction of the Court. It is said that regard must be had also to one case, at any rate, of *Hyman* v. *Hyman* (4), heard in the House of Lords the year before last, in which the House of Lords laid it down that where the Matrimonial Causes Acts and the substituted terms of the more recent statutes invest a wife after divorce with the power to apply for maintenance and repose in the Court the duty of determining whether maintenance shall be provided by the husband, an agreement between the wife and the husband in anticipation of the occurrence of such a state of things does not exclude the power of the wife to apply to the Court, and does not delete the jurisdiction of the Court to make an order for maintenance. That is put on the broad ground that public interests are involved, that the Court has to deal with the question of the right of a wife to be maintained by her husband, although by reason of his misconduct the marriage tie has been dissolved, and that the right of the wife is a matter of public concern. That, no doubt, does give some ground for considering, in respect of

(1) 3 Sw. & Tr. 338, 346, 347.
(2) 7 P. D. 225.
(3) L. R. 1 H. L. (Sc.) 63.
(4) [1929] A. C. 601.

decrees or orders of the Court affecting the relations of husband and wife, whether the matter as to which the jurisdiction is invoked is a matter where it is necessary to take account of considerations other than those raised by the parties.

Putting it in the broadest way, it is said on behalf of the husband here that these parties, in view of the nature of the statutes and the jurisdiction, could not lawfully enter into an agreement which precluded one or the other of them from alleging misconduct of the other in any proceedings in this jurisdiction affecting their marriage. It might be put more narrowly. It might be expressed in this way, that if one shall bring a suit for divorce, the provisions of the law impose upon the other an implied obligation or, at any rate, give a right to bring to the notice of the Court in those proceedings whatever matters are deemed necessary to be before the Court with a view to the proper exercise of the discretionary jurisdiction of the Court, and whatever facts are relevant to the exercise of that jurisdiction. Well, that is a very large proposition. Counsel for the husband has not concealed that it has some very alarming aspects. In its broadest form it would be a formidable and, perhaps, vital impediment in many cases to any attempt at reconciliation between married people, who had fallen out for the gravest possible reasons, and whose reconciliation might be the most vital interest of their lives, because what it involves is that no reconciliation about the gravest questions could be final. In case of a future quarrel upon some grave question it would be open to either of the parties to reopen the old matters, and so the happy oblivion, which is the condition precedent to most agreements for reconciliation, would be an idle vision and could not come into being. However, the matter has to be dealt with upon the arguments which have been adduced.

The difficulty which is said to exist is said to arise by reason of the provisions now embodied in s. 178 of the Supreme Court of Judicature (Consolidation) Act, 1925. I do not think that counsel for the husband presented, as

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a substantial part of his case, arguments founded upon sub-ss. 1 and 2. Upon petitions for divorce it is the duty of the Court under sub-s. 1 to satisfy itself whether the petitioner has been accessory to, or has connived at, the adultery in question, and to inquire into any counter-charge. Then under sub-s. 2 the duty upon the Court is to dismiss a petition if it shall find that the petitioner has been " accessory to or has connived at or has condoned the adultery complained of, or that the petition is presented or prosecuted in collusion." I do not think those sub-sections were really relied upon here. They were cited, and it said they had a bearing upon the matter, but the sub-section which was relied upon was sub-s. 3. By sub-s. 3 " the Court shall not be bound to pronounce a decree of divorce if it finds that the petitioner has during the marriage been guilty of adultery, or, if in the opinion of the Court he "—that means he or she —" has been guilty of," among other things, " such wilful neglect or misconduct as has conduced to the adultery." It is said that the discretionary grounds there read in the light of the prohibitive provisions of the earlier sub-sections afford reasons why it ought to be held that these allegations in the answer should stand upon the record. It is said that it makes forgiveness immaterial, and it makes reconciliation immaterial. Public interest is said to require that there shall be a complete investigation of the relations of the parties, and the respondent, having been made a suitor, must conform to that requirement of public interest.

It is necessary to consider how the law really stands with regard to this matter. I cannot help thinking that in the background of this application there has been a consideration of the development of the practice of the Court in respect of the exercise of the discretionary jurisdiction. Reference has been made to the necessity for a petitioner for divorce who is seeking the exercise of the discretion to make disclosure of the facts in respect of which the exercise of the discretion is sought. That, of course, is an important matter in the exercise of the jurisdiction in divorce, but that, so far as I know, is the extreme length to which practice or authority

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has gone in respect of disclosure of that kind. No citizen is under any obligation to become a suitor for divorce. The question is whether a party to a divorce proceeding has some duty other than those directly prescribed by the statute, and whether this deed of separation infringes those duties. If there are duties which it infringes then it is contrary to law. We need not talk about public policy. I sympathize with the view which has been expressed by many learned judges as to the mischief veiling a legal procedure which cannot be justified by direct authority upon the assumption that it is required by the public interest. What is law, and what is not law, are the real tests of public interest. The matter was referred to quite significantly in a passage from the judgment of Lord Bramwell in the well known case of the *Mogul Steamship Co.* (1), where Lord Bramwell pointed out what the things are which are really prohibited as matter of agreement and what alternative remedies to an action for avoidance of agreement there may be. Looking at this agreement on the face of it counsel for the husband says — and, I think, he says accurately — that if parties who were aware of the grossest misconduct on the part of the other party came to a conclusion that they would get a collusive divorce, then, as a preliminary to the arrangement for the provision of evidence, they might enter into an agreement such as that contained in the separation deed here to cloak all the past, and prima facie it would be effective. I think that is the submission he makes. If that conclusion is fatal to the terms of this separation deed, then probably it must fall: yet the real question here is whether this deed between the parties is contrary to public policy. Reading the deed in its true light and assuming that the parties to it are parties desiring not to deceive a Court of justice, but to regulate their own lives and to secure their mutual advantage and the advantage of their children, it does not deserve the implied opprobrium which was involved in the expression of regret with which counsel for the husband approached the attack

(1) [1892] A. C. 25, 45.

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upon it. Any agreement, better consistent with the well being of an ordered community in this sphere of fact, you would not find. Does it become an agreement against public policy because it could be used as an instrument of evil? If it were so, then every partnership agreement might be attacked, because it could cloak criminal conspiracy.

To my mind the sole ground on which this deed could be successfully attacked is that it was, in fact, a bargain between the parties to pervert the course of justice and to withhold from the Court means for the due administration of justice. Looking at the facts of this case, it is not suggested that there was any such plot in view. If there had been, it would have been a simple thing to have taken steps for the cancellation of this deed. No such steps were taken, and, as I think, no such possibility existed. That being so, the agreement being an agreement entered into with an honest intention conformable to law and honestly expressed in the terms of the agreement, it is no answer to it to say that, if the facts had been otherwise, it could have had a dishonest and illegal operation.

The conclusion at which I have arrived is that the agreement is a perfectly good agreement, that the authorities which have been in force for nearly fifty years sustaining an agreement of this kind are as good to-day as they have been during all that time, and, therefore, the motion should succeed and the paragraphs in the answer to which objection is taken should be struck out.

Solicitors for the wife: *Withers & Co.*

Solicitors for the husband: *Bird & Bird.*

R. M. M.

Referred to. In re ADAMS, DECD. [1951] 1 Ch. 716

NEWBOULD *v.* ATTORNEY-GENERAL.

1931 *Feb.* 20.

Legitimation—Previous Marriage of Parent of Person seeking Legitimation—Decree of Nullity of previous Marriage—Incapacity of other Party to previous Marriage to consummate it—Effect of Decree of Nullity—Legitimacy Act, 1926 (16 & 17 *Geo.* 5, *c.* 60), *s.* 1, *sub-s.* 2.

A final decree annulling a marriage on the ground of the incapacity of one of the parties to it to consummate it has retrospective operation, so that the effect of the decree amounts to a declaration that there is no marriage. The contract of marriage may be impeached and declared null and void if there was incapacity to implement it, notwithstanding that in certain cases the right to complain to the Court may be lost by reason of the conduct of the party complaining.

On a petition under the Legitimacy Act, 1926, for the declaration of the legitimacy of the petitioner, born in April, 1929, of parents married subsequently in November of the same year, it appeared that his father went through a ceremony in 1909 with a woman not the mother of the petitioner, and that the decrees nisi and absolute pronouncing that ceremony null and void on the ground of the incapacity of the woman to consummate marriage were respectively pronounced after the birth of the petitioner:—

Held, that the case was not within the mischief of the provision of s. 1, sub-s. 2, of the Act excluding from its operation the legitimation of a petitioner one of whose parents was married to a third party at the date of the birth of the petitioner.

PETITION for declaration of legitimacy under the Legitimacy Act, 1926, as amended by the Administration of Justice Act, 1928 (15 & 16 Geo. 5, c. 26), s. 19, sub-s. 3, Sch. I., Part III.

The petitioner Peter John Newbould, who was born on April 23, 1929, prayed by his father and guardian Alfred Ernest Newbould to have a decree declaring that the said Alfred Ernest Newbould and Dorothy Irene Pugh, who were his father and mother, were lawfully married on November 30, 1929, and that he (the petitioner) was legitimate as from that date.

Apart from formal proofs the question for decision was whether the impediment was removed of s. 1, sub-s. 2, of the Act of 1926—namely: "Nothing in this Act shall operate to legitimate a person whose father or mother was married to a third person when the illegitimate person was born."

Alfred Ernest Newbould, the father of the person to be legitimated, was married on October 27, 1909, to one

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Grace Lucy Kirkby. On May 15, 1929, after the birth of the petitioner, a decree nisi was pronounced annulling the marriage of Alfred Ernest Newbould and Grace Lucy Kirkby by reason of the incapacity of the said Grace Lucy Kirkby to consummate the same, and the decree absolute, dated November 25, 1929, declared the said marriage to be and to have been absolutely null and void and that Alfred Ernest Newbould was and is free from all bond of marriage with Grace Lucy Kirkby.

C. P. Harvey for the petitioner. On the facts there never was a valid marriage between Alfred Ernest Newbould and Grace Lucy Kirkby, and the words of the decree applying to the past as well as the present so declare. Apart from any form of words it is clear law that in such a case there has never been a marriage. In *B.* v. *B.* (1) Dr. Lushington laid down that marriages like the one in question are in themselves ab initio void. So in *G.* v. *M.* (2) Lord Selborne in discussing a woman's claim for a declaration of nullity of marriage on the ground of the impotence of the man speaks of the issue as being whether the woman was the wife of the man. In the same case Lord Watson in discussing the doctrine of "sincerity" in such cases speaks of the party complaining as challenging the "existence and validity" of the marriage. Lord Bramwell uses similar language. The necessary inference from these dicta is that such a marriage as the previous one in the present case is to be regarded as null and void at all material times. In *Napier* v. *Napier* (3), a suit for nullity on the ground of impotence, Lord Cozens-Hardy M.R. said: "The Ecclesiastical Courts did not dissolve a marriage. They only declared that there had been no marriage at all." In *Lewis* v. *Hayward* (4), referred to by Pickford L.J. in *Napier* v. *Napier* (5), the House of Lords declared a marriage void ab initio on the ground of impotence and the Lord Chancellor (Lord Chelmsford) applied the maxim "Quod ab initio non valet in tractu temporis non convalescit."

(1) (1854) 1 Ecc. & Ad. 248.
(2) (1885) 10 App. Cas. 171, 187, 188, 198.
(3) [1915] P. 184, 186.
(4) (1866) 35 L. J. (P. & M.) 105.
(5) [1915] P. 184, 190.

[He also referred to *P.* v. *P.* (1), and especially to the judgment of Ronan L.J. in that case.]

Ivan Horniman (*Sir Gervais Rentoul K.C.* with him) for the Attorney-General referred to *A.* v. *B.* (2)

THE PRESIDENT (LORD MERRIVALE). This case required the close attention given it by the learned counsel engaged. It is a petition for declaration of legitimacy. The petitioner is an infant child born in 1929 of parents married in the same year. If neither of the parents was married to a third person at the date of the birth then the petitioner has a right to be declared legitimate under the Act of 1926. The father of the child as its guardian ad litem seeks a declaration of its legitimacy in the interest of the child. From his evidence of the facts it appears that in October, 1909, he went through a ceremony of marriage with a woman, but he produced the proper proofs that he had taken the necessary proceedings to have that marriage declared void on the ground of her incapacity to consummate it, and a decree nisi for nullity was pronounced on May 15, 1929, after the birth of the petitioner, the person with whom he had gone through the ceremony of marriage appearing but not defending the suit. The decree absolute pronounced the marriage "to be and to have been absolutely null and void." Now the question has to be considered whether a decree so proved whereby a ceremony of marriage is pronounced to have been a mere ceremony decided that it did not result in a marriage at all or whether the decree dissolved a marriage which had previously existed. This renders it necessary to carefully consider the cases. In *G.* v. *M.* (3) the matter was fully considered, and counsel for the petitioner contends that it was there held that a decree of nullity for impotence has a retrospective operation, so what the decree has effected amounts to a declaration that there is no marriage at all. In *Napier* v. *Napier* (4) Lord Cozens-Hardy M.R. says this: "The Ecclesiastical Courts did not dissolve a marriage. They

(1) [1916] 2 I. R. 400, 428.
(2) (1868) L. R. 1 P. & M. 559.
(3) (1885) 10 App. Cas. 171.
(4) [1915] P. 184, 186.

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only declared that there had been no marriage at all." Counsel for the Attorney-General also referred to *A.* v. *B.* (1), where Lord Penzance sums up the views which had been taken on the question of void and voidable marriages, and dealing with a case where relatives of a deceased party sought to annul a marriage which she had gone through in her lifetime, speaks of the "annulling the contract of marriage" and dwells on the considerations limiting the power of the Court which arise from the conduct of the parties. This shows the view of an authority of the experience of the learned judge that the contract might be impeached albeit only during the lifetime of the parties if due grounds were shown for its impeachment. If there is disability to implement the contract, the contract may be declared null and void, though a case may be shown of the complaining party being disabled from calling for investigation. There have been many cases where it has been decided that a party could not be heard to complain to the Court, but this only shows that the right to complain as a personal right may be lost. In this case it is established that incapacity was found and declared against the respondent in the former suit, and in due course a decree absolute was pronounced. That decree is valid and cannot be impeached except by proper proceedings for the purpose, and it must have effect accordingly.

The petitioner is entitled to the declaration his father now seeks on his behalf.

Solicitors for the petitioner: *H. S. Wright & Webb.*
Solicitor for Attorney-General: *Treasury Solicitor.*

(1) L. R. 1 P. & M. 559, 562.

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C. A.
1931
March 9, 10.

Shipping—Charterparty—Timber Cargoes—Alternative Methods of Discharge —"If customary and available"—Congestion at Dock—Insistence on Methods not available—Damages for Detention.

Under several bills of lading, which incorporated all the terms of two charterparties in identical terms, the plaintiffs contracted to carry on board their vessel certain timber consigned to the respective defendants from a Norwegian port to the port of Garston. Under the charterparties the vessel was to "proceed to Garston or so near thereto as she may safely get"; and, by clause 13, the cargo was to be discharged in the customary manner "on to the quay and/or into lighters and/or craft and/or wagons and/or on to bogies and thereon stowed and/or stacked as customary at the port of discharge, the consignees having the right to select any one or more of these alternatives if customary and available at the time of discharge."

Owing to congestion at Garston dock the London Midland and Scottish Railway Company, the owners of the dock, informed the plaintiffs' agents that the company were unable to accept any vessels for which storage accommodation was required for any material portion of their cargo, but that they could accept vessels where the whole cargo could be discharged into main line railway wagons and sent direct from ship to destination. When the ship arrived off Garston dock the defendants refused to agree to this method of discharge and alleged that the customary method of discharge for cargo destined for Garston itself was into "domestic" wagons which took the timber to the storage ground for sorting and/or storing. Ultimately, to put an end to the deadlock, the railway company arranged to take the timber to another storage ground at Widnes, ten miles away.

The plaintiffs claimed demurrage or alternatively] damages for the detention of their vessel.

The judge of the Liverpool Court of Passage found for the defendants on the ground that the defendants' insistence that the timber should be sorted and stored was not a breach of their contract. The plaintiffs appealed:—

Held, that the defendants had no right to claim that they were entitled to store the timber on the railway company's ground at Garston; that it appeared that the respective consignments of timber could be, and in fact were, delivered without sorting; and that, as main line wagons were available, the defendants were liable in damages for their breach of contract in preventing the ship arriving in her discharging berth on the date when but for their insistence on having their timber stored the railway company would have admitted the ship into dock.

Decision of the Liverpool Court of Passage reversed.

APPEAL from the Court of Passage of the City of Liverpool. The plaintiffs, Fornyade Rederiaktiebolaget Commercial, owners of the steamship *Varing*, appealed against a decision

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of the presiding judge (Sir W. F. K. Taylor) sitting in Admiralty, in favour of the defendants, W. V. Blake & Co. and Joseph Green, timber merchants of Manchester and Keighley respectively. The claim was for 195*l.* demurrage or damages for detention of the ship.

By fourteen bills of lading dated September 5, 1927, and five bills of lading dated August 31, 1927, of which the defendants Blake & Co. and Joseph Green were respectively the holders, the plaintiffs contracted to carry certain timber on board the *Varing* from Stugsund to the port of Garston as per charters dated August 9 and 10, 1927. The bills of lading incorporated all the terms, conditions and exceptions of the charterparties, which were in identical terms and provided that "the vessel . . . . shall proceed to Garston or so near thereto as she may safely get," and, by clause 13, that "the cargo shall be discharged by the vessel in the customary manner . . . . on to the quay and/or into lighters and/or craft and/or wagons and/or on to bogies and thereon stowed and/or stacked as customary at the port of discharge, the consignees having the right to select any one or more of these alternatives if customary and available at the time of discharge."

Clause 15 provided that "should the vessel not be loaded or discharged with despatch in the manner hereinbefore provided whereby the vessel is detained demurrage shall be paid at 30*l.* per day and pro rata for any part of a day."

The plaintiffs' case was that they were informed by the London Midland and Scottish Railway Company, the owners of the dock at Garston, before the arrival of the *Varing* in the Mersey that they were unable, owing to congestion, to accept any more vessels for which storage accommodation was required for any material portion of the cargo, but that they would accept vessels where the whole of the cargo was to be discharged into railway wagons and sent direct from ship to destination; that the defendants refused to allow their timber to be so dealt with and required it to be sorted and stored on the dock estate, with the result that the dock authorities refused to allow the vessel to enter; and that

the *Varing*, which had arrived off Garston dock on September 15, was unable to dock until the midnight tide of September 27, when the defendants agreed to discharge into main line wagons at Widnes, ten miles away, without sorting or storing.

The plaintiffs claimed that the *Varing* was an "arrived" ship on September 15, and that thereupon her time for discharge under the terms of the bills of lading began to run. In the alternative they claimed damages for breach of contract whereby the discharge of the cargo was wrongfully prevented.

The learned judge found the facts to be as follows:— A substantial portion of the *Varing's* cargo belonging to the defendants had not been sold, and, wherever delivered, was under the necessity of being sorted and stored. The customary mode of discharge at Garston is by shore crane to wagons. If the cargo has to be sorted and stored it is landed into "domestic" or "red" wagons, and transported to the sorting ground on the estate. If it is to be sent away it is delivered into main line wagons. On September 25 the *Varing* arrived in the Mersey and anchored in the Sloyne. If the defendents had agreed to have the timber delivered into main line wagons and not insisted on their alleged right to have it sorted and stored the vessel could have been admitted into dock on September 24. The difficulty was solved on September 27 by the dock authorities, who obtained a storage ground at Widnes which all parties agreed to regard "as if" Garston in all respects.

The learned judge found that the *Varing* was not an "arrived" vessel until September 27; that the circumstances were such as to make it reasonable for the plaintiffs to adopt an alternative port for delivery of the cargo and that they never did so; that the *Varing* was refused entry because the dock authorities knew that a substantial portion of the cargo had to be sorted and stored at Garston, and that the consequent delay was not a breach of their contract by the defendants. But, in case his view of the facts or the law should be held to be erroneous and the plaintiffs should be

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held to be entitled to recover, he thought the amount claimed, 6½ days at 30*l.* per day, was correct.

The plaintiffs appealed.

R. E. Gething for the appellants. Owing to the congested state of the dock the only method of discharge "customary and available at the time" was into main line wagons, and the defendants should have accepted that method as soon as the *Varing* arrived. She would have become an "arrived" ship on September 24, when the railway company would have admitted her into dock for discharge into main line wagons. The defendants wrongly prevented her becoming an "arrived" ship. In fact, the respective defendants' goods were distinguishable, and the defendants were not entitled to use the ship as a warehouse because they had not sold their timber and the dock authorities were unable to store it. If a ship is prevented from getting to a berth owing to an obstacle created by the charterers in performing their duty it is well established that the shipowner has done all that is needful when he has brought the ship to the loading or discharging place, and the charterers must pay for the subsequent delay: see Lord Phillimore's observations in *Hogarth* v. *Cory Bros.* (1)

The appellants may not be entitled to damages as from September 15, when the *Varing* arrived off Garston, but they are at least entitled to damages in respect of the four days from September 24 to September 27 inclusive.

[Reference was also made to *Dahl* v. *Nelson, Donkin & Co.* (2); *Horsley* v. *Price* (3); and Scrutton's Charterparties and Bills of Lading, 12th ed., p. 361.]

F. A. Sellers for the respondents. Under the contract the respondents were entitled to delivery at Garston, and if the timber was discharged into main line wagons it had to go somewhere else before the respondents could get it. The practice as to discharge at Garston docks is summarized in *Dampskip Selskab Svendborg* v. *London, Midland and Scottish*

(1) (1926) 26 Ll. L. R. 464, 469. (2) (1881) 6 App. Cas. 38.
(3) (1883) 11 Q. B. D. 244.

Ry. Co. (1) In fact there was no "customary method of discharge" "available at the time," for the only customary method of discharging timber cargoes destined for Garston itself is into "red" or "domestic" wagons. It was not the fault of the respondents that the railway company refused to let the vessel come in, and the shipowners ought then to have taken the ship to another place of discharge as near to Garston as she could safely get: see *Dahl* v. *Nelson, Donkin & Co.* (2)

No reply was called for.

SCRUTTON L.J. This is an appeal from the Court of Passage, the claim being for either demurrage, or what I may call quasi demurrage, in respect of a Norwegian ship, the *Varing*, which was chartered under the Scanfin form of charter to proceed to a Scandinavian port to load timber, and therewith proceed to Garston, or so near there as she could safely get. At the discharging port, by clause 13, the cargo of the ship was to be discharged by the vessel "in the customary manner, as fast as the vessel can deliver during the ordinary working hours of the port, on to the quay and/or into lighters and/or craft and/or wagons and/or on to bogies and thereon stowed and/or stacked as customary at the port of discharge, the consignees having the right to select any one or more of these alternatives if customary and available at the time of discharge."

It is important to remember that this Scanfin Charter is a general form of charter made out so as to be applicable to a large number of ports, and consequently some of these words frequently have no application to the particular case which is then under consideration. That is particularly true of clause 13, because there are many ports at which you cannot discharge into lighters, there are many ports which have not got any bogies, and there are some ports which have not got a quay. Clause 13 therefore has to be considered in the particular instrument by the circumstances of the particular port for which the Scanfin Charter has been used. This

(1) [1930] 1 K. B. 83. (2) 6 App. Cas. 38.

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Court had, about a year ago, a case of the owners of the ship *Svendborg* suing the railway company, which own the docks at Garston: *Dampskip Selskab Svendborg* v. *London, Midland and Scottish Ry. Co.* (1) There was a great deal of evidence given, and the question there was, inasmuch as the regular mode of delivery at Garston is into wagons, at what point of transit from the ship to the wagon does the ship's liability to expense cease and the consignees' liability for expense begin? There was a long discussion as to which party was to stow the timber that came from the crane as it was dropped into the wagon. It was clear, in all that discussion, that the ship had nothing whatever to do with the matter after the timber reached the wagon. Consequently it never became necessary to look into the question which is the subject-matter of this case—namely, what is to happen to the cargo when it comes away in the wagon—and therefore nothing will be found about that part of the case in the judgment. But I see that I reserved my opinion on a matter which has some relevance in this case, and that is where the ship delivers its consignments of timber in a heap or in a lump. I said in the course of my judgment at p. 93: "I mention, to show that I have not overlooked it, that it is not ordinarily good delivery to tender goods of two consignees claiming different marks mixed up together and to leave the consignees to sort them," unless the consignees have acquiesced in that form of delivery. Obviously the ship must make delivery of each parcel to each consignee in the absence of express agreement and must not discharge all its contents in a heap and say, "Now sort it out for yourself." In many ports, to avoid the delay of sorting, the goods are tumbled out in a heap and sorted by the dock company, as agents partly of the ship and partly of the consignees, and then delivery is made to the respective consignees.

Now what has happened in this case is this: I should mention first that the charter purports to be to Garston, not to Garston docks, and if there had been another place of delivery in Garston—in the locality known as Garston—the circumstances would have been very different from what they are

(1) [1930] 1 K. B. 83.

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in this case, where it is admitted that there was no "usual place of delivery" in Garston, except Garston dock. At the time that this timber was shipped there was great congestion of timber in the Lancashire ports, with the result that the storage ground at Garston docks, where cargo was put which had to be sorted or which the consignee wished to store until he had sold it, was full up, and likely to be full up for a considerable time. Other Lancashire ports were also in somewhat similar difficulties, and the congestion was so great that the London, Midland and Scottish Railway Company had to put up notices that in the case of a ship with timber coming into their dock, if the consignee were not ready to take it straight away by what are called "main line trucks" on the railway, but wanted to have it stored, the railway company could not take that ship into dock, because they had no room to store the timber which the consignee desired to have sorted and stored until he could sell it. "On the other hand," said the railway company, "if what you want to do does not involve sorting and storing, but if the ship is ready to make delivery to you into railway wagons which will go straight out, we can take the ship if substantially the whole of the cargo is ready to go that way." That was the position at the time that the *Varing* arrived off Garston—I will explain what I mean by that in a moment—on September 15. One can illustrate it by two letters. On the day on which the *Varing* arrived in the neighbourhood of Garston a letter was written to Blake, one of the consignees. There were three consignees of timber—Mr. Blake, Mr. Green and Mr. Craig—having between them about 500 standards, of which Blake had about 300, Green 100 or a little over, and Craig a little under 100. The letter reads: "We are in receipt of your letter of yesterday's date with respect to the above steamer, and have taken this matter up with the railway company, but regret to have to advise you that they will not accept this steamer for Garston unless practically the whole of her cargo can be loaded into main line wagons at ship's side, and sent away from Garston, without sorting or measuring on this estate"—that is the Garston estate.

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That was answered by Blake direct to the railway company on the next day: "We understand from Messrs. Ed. Nicholson, Ld., this morning that you are refusing to accept this steamer for Garston unless practically the whole of her cargo can be loaded into main line wagons at the ship's rail and sent away from Garston without measuring or sorting. We regret to say it is impossible for us to do this. All our orders require usual measuring and sorting and we must kindly ask you to reconsider your decision. Failing this, we beg to advise you that we have no option but to hold you responsible for any loss which we may sustain through your refusal to accept this vessel at your port, as no notice was given of this refusal before the vessel sailed from the loading port."

The position, therefore, was this: The railway company say: "We can take no ship which claims that its cargo shall be sorted and stowed on our storing ground." The consequence of that was that for some days, I will not mention how many days for the moment, the ship was refused admission to the dock, because the consignees said: "We insist on the cargo when it is landed on the quay"—in the way I will describe in a moment—"being sorted and stored on your estate until we have sold it and until we can know where we are going to send it." The question is, what is the effect of that attitude of the consignees to the claim of the ship? The ship came and could not get into the only usual place of discharge, because of the attitude of the consignees. The ship proceeded to the usual place in the River Mersey—which is not Garston—where ships waiting to get into dock lie, a place on the opposite side of the Mersey, called the Sloyne Channel. It is agreed that the Sloyne is not a usual place of discharge, though it is a usual place of waiting, and the charterparty said "to Garston" or as near thereto as she could safely get.

The liability and rights of a ship in that position have been laid down once and for all in *Dahl* v. *Nelson* (1), and an infinite number of differences arise which give opportunities to industrious counsel to cite a number of other cases

(1) 6 App. Cas. 38.

which are not the case before the Court, and to explain in what respect they differ or agree with the case before the Court. But, after all, one goes back to *Dahl* v. *Nelson* (1), and as I understand the decision of the House of Lords, it is this: when you are chartered to go to a discharging place and cannot get there, you are bound to wait a reasonable time before having recourse to the clause "or as near thereto as she can safely get." You cannot arrive and, when you find that you cannot get in on the exact day you desire, immediately go off to a place which you describe as "as near thereto as she can safely get." When a reasonable time has elapsed, and when there is no chance of your getting in to your discharging place within a reasonable time, the ship is at liberty to go to a reasonable discharging place—"as near thereto as she can safely get"—and can call upon the consignee to take delivery at the substituted place. But the shipowner must make up his mind what he is going to do and give notice to the consignee, saying, "I am going to such-and-such a place being the nearest discharging berth to which I can safely get, and you must take my cargo there." Obviously, inasmuch as it involves the question whether the ship has waited a reasonable time, and whether a particular place is a reasonable place—"as near thereto as she can safely get"—shipowners should always be slow before taking a decided course of that sort, and landing themselves with a lawsuit in which it will be uncertain what the result may be on the facts. In the present case, although everybody wrote a great many letters, the plaintiffs never did take the decided course of saying, "We are going," for instance, "to Liverpool, and shall tender you the cargo there, and you will be liable for all costs if you do not take the cargo at the place, 'as near thereto as we can safely get,' where we propose to discharge it."

The consignees held out for a considerable time in their insistence on storing and stowing their timber at Garston; and the dock authorities held out for a considerable time that they were not going to let a ship in to stow and store

(1) 6 App. Cas. 38.

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its cargo at Garston. The shipowners also insisted that, in some way or other, they were going to claim the costs of the delay occasioned to them by the claim of the consignees, which, said the shipowners, "is one which you have no right to make." Various suggestions were made—I am only going to refer to one of them—and a number of these suggestions were without prejudice to the ultimate rights (that is to say, the fact they were made was not to prejudice the ultimate rights) of the consignees Blake and Craig, who were, apparently, acting in concert with Green. Messrs. Blake wrote: "We are prepared, entirely without prejudice, to arrange for our goods to be sent away all direct ex ship at Garston, avoiding sorting and storing at this port, but the extra expenses we shall incur doing this will amount to about 12*s.* 6*d.* per std."

I now come to a question which arises on the charter. It appears that in Garston you do not discharge on to the quay and you do not discharge on to lighters or into carts; you do discharge into wagons, but into two sorts of wagons. If you are going to send the goods straightaway you discharge into main line railway wagons. If you are going to store the goods at the port you discharge into what are called "domestic or red" wagons, which take the timber away to the sorting ground. If a ship does deliver in such a way that all her cargo has to be sorted, then the cargo is taken away in the domestic wagons to the sorting ground. The right which the consignee has of selection is the right to select any one or more of those alternatives if customary and available at the time of discharge. Now, taking goods that are going to be stored in domestic wagons to the sorting ground is customary, but it is clear that it was not available at the time of discharge, for if the consignees had said to the dock company, "We are going to have these goods stored at Garston dock," the ship would never have got into dock, because the railway company, having no room in the storing ground for any more cargo of that sort, would have refused to take them.

In these circumstances, were the consignees right in insisting that they were going to store at Garston? In my

view they were not right, because the method of discharge into domestic wagons to go into store at Garston was not then available. Consequently, in my opinion, unless a certain state of facts existed (which I will mention in a moment), the consignees were preventing, and wrongfully preventing, the ship from reaching the place provided for in the charter. The result would not be demurrage technically, but it would be damages for preventing the ship from reaching her place of discharge—which would have practically the same result as if there were a claim for demurrage.

Now the state of facts which presents a difference to that position is this : a ship, if required to do so, must deliver to each consignee separately, and the ship must do the sorting necessary to make delivery. It is only by some special form of contract or custom that the ship can do what is done in many timber ports—tumble the whole of the cargo out and then pay for the sorting on the dock premises. An attempt has been made here to prove that delivery could not have been made without sorting on the quay or the storing ground. In my opinion it failed. The defendants called no evidence, and therefore the Court was left on the facts as proved by the plaintiffs, plus some evidence given by Mr. Topham, the dock manager. Mr. Topham's expressed opinion was—perhaps as the result of long experience of timber cargoes—that he really would not have been able to deliver direct to wagons without sorting, and he went so far as to say that the cargo in this particular ship—about which I do not think he remembered much—could not have been delivered without sorting. The answer to that is that it is not a fact, because one of the three consignees did take his cargo right away from the ship in railway wagons without any sorting at all. It appears that the cargo was so stowed in the ship that by means of stowage plans it could have been delivered, without sorting, direct to the railway trucks, and it could have gone away. That is borne out by the letter to which I have already referred in which Blakes, themselves, offer to have the cargo go straight away, without sorting, in railway trucks. In the view which I take of those facts, it follows that there

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is a claim for damages against these two consignees for preventing the ship from going into dock to her place and discharging, so that she did not become an "arrived" ship until a later date. In effect the consignees were endeavouring to put upon the ship a burden occasioned by the fact that the consignees had not sold their cargo on the arrival of the ship and therefore wanted to store it in Garston.

The learned and very experienced judge of the Court of Passage has taken a different view, but having read his judgment very carefully I have not been able to ascertain why he took that view. I have stated the view which, in my opinion, ought to have been taken. Part of the learned judge's opinion is, I think, the result of a mistake of fact. He says: "They"—that is the consignees—"did not refuse discharge into main line wagons, but they did state that their timber not being disposed of at any destination outside Garston, required sorting and storing there. This fact, known to the dock authorities, was, in my view, the cause of the refusal to allow entry and of the consequent delay, and was not, in my judgment, a breach of their contract by the defendants." Then he goes on: "The defendants did insist on delivery at Garston, but this insistence was not the cause of the refusal by the dock authorities nor of the delay." I do not know why the learned judge says that. It was their insistence on having the goods stored at Garston which was the cause of the dock company refusing to admit the ship into Garston and the cause of the delay.

For the reasons I have given, I think the learned judge came to a wrong conclusion. The only question that remains is how much the learned judge has found by way of damages, in case he is wrong. He found for the plaintiffs in 195*l.* damages. But I think, again, he has not appreciated all the facts. It was proved by Mr. Topham that if the consignees had not insisted on having their goods stored at Garston, the *Varing* would have got into dock on the 24th. But she did not, as a matter of fact, get into dock until the night tide of the 27th and the morning of the 28th. She got in because the dock company, making a great effort to

get rid of the congestion which prevailed, arranged to take the goods, without any extra expense, to the storing ground at Widnes, ten miles from Garston, a thing which would not have fitted in with the contract at all unless the ship and the consignees were agreed about it. The result of that appears to me to be that there being some slight difference as to the exact times, the 195*l.* which the learned judge has suggested to be the damages, should be reduced to 100*l.*, which would substantially represent the damage, in my view, caused by the breach of contract by the consignees.

The appeal must be accordingly allowed and judgment entered for the plaintiffs, against the consignees, for 100*l.*, with costs here and below.

GREER L.J. I agree. But for the fact that the learned and accomplished judge who presides over the Court of Passage has held that the plaintiffs made out no case against the defendants, I should have thought that this was a case in which the plaintiffs were plainly entitled to succeed—at least for the amount which my Lord has mentioned.

There were three consignees, holders of bills of lading, of wood cargo on board the *Varing*. The bills of lading incorporated the terms of the two charterparties. My Lord has read clause 13, and I begin the consideration of this case with the well known principle that the discharge of a ship is a double operation, in which the consignees have got to take their part and the ship has got to take its part. The ship has nothing to do with enabling the consignees to perform the consignee's duty. The law was laid down a long time ago by the late Lord Esher in *Petersen* v. *Freebody & Co.* (1) in these words: "The operation, therefore, which is to take eight days"—there were eight days in that case—"is an operation to be performed as between the shipowner and the consignees. Whichever word be used, whether it be called a "discharging" or a "delivery," and whatever be the circumstances of the delivery, one party is to give, and the other is to take, delivery at one and the same time, and by

(1) [1895] 2 Q. B. 294, 297.

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one and the same operation. It follows that both must be present to take their parts in that operation. Those parts are, the ship has to deliver and the consignee to take delivery —where? Each has to act within his own department. The shipowner acts from the deck or some part of his own ship, but always on board his ship." That last sentence has to be modified by reason of some subsequent decisions, but the rest of the words to which I desire to call attention refer to what a receiver has got to do—which is the important matter to consider in the present case. The learned Master of the Rolls went on to say: "The consignee's place is alongside the ship where the thing is to be delivered to him. If the delivery is to be on to another ship, he must be on that ship; if into a barge or lighter, on that barge or lighter; if on to the quay, on the quay." It seems to me it is no concern of the ship what the consignee may desire as to the kind of vehicle in which he is going to receive his cargo. He has got to be at the place of discharge with his vehicle—if it is to be delivered into a vehicle—ready to receive the cargo.

In this case there were three consignees and a number of separate bills of lading, and the evidence satisfies me, beyond any reasonable doubt, that it was possible for the ship to distinguish between the cargo covered by each of these bills of lading and to deliver to each consignee, if he was ready to receive it, the cargo, the subject of his bills of lading. "But," the defendants say, "we could not take delivery, because the railway company refused to store and sort the goods." The goods did not want sorting, and the railway company could not store them, because they had not got storage room. That seems to me entirely to be a matter for which the consignees must take the responsibility, and not a matter for which the ship is in the least responsible. The consignees have got to be there with wagons that will take the cargo. If they prove that some unforeseen event made it impossible for them to have the wagons there at all, then they might have a good defence to the action, but they did not prove anything of the kind. All they proved was that the only

wagons they could get there ready to receive the consignment were wagons which would immediately go off the dock premises, and they could not get wagons in which the dock company would agree to take the goods to a storage place and there store them. That seems to me to be a matter with which the consignees alone are concerned.

Those considerations, in my judgment, are sufficient to enable the Court to say the plaintiffs were entitled to damages. It was no answer for the consignees to say: "We did not want these goods in main line wagons; we wanted them in wagons which would be taken by the dock company, so that they could be stored at the dock premises." By their continued refusal to take these goods, unless they were delivered into wagons for storage on the dock premises, they were breaking their contract. The contract was that, as soon as the vessel was an "arrived" ship they were to take the goods which were tendered to them by the ship. Now the vessel at one time, it was suggested, was an "arrived" ship—on September 15. On the evidence, however, it appeared that she could not get into the place where she had to go—namely, the usual discharging place in Garston dock on September 15—but only got there on September 24, and, therefore, she cannot claim anything in respect of the delay up to September 24. But by reason of the attitude taken up by the consignees she was subjected to a further delay until September 28, and therefore she was entitled to claim damages in respect of that delay. She is not entitled to demurrage properly so-called, because after she got to the place of discharge she was discharged within the contract time. What she is entitled to is damages for detention during the four days in which she was prevented, by the wrongful attitude taken up by the receivers, from getting into the place of discharge. It is not definitely proved that the delay was four days, it may have been only three days and part of a day. Accordingly, I think the case will be met by awarding the plaintiffs the amount of damages which my Lord has mentioned—namely, 100*l.*

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SLESSER L.J. I agree. Were it not that we were differing from the learned and experienced judge who heard this case, I should have been content to have added no more. But there are one or two indications as to the issues which were really at stake in this case which, I think, may profitably be considered. The substance of the defence is contained in para. 5, where the pleader says that by clause 13 of the charterparties when the *Varing* became an "arrived" ship, the defendants had the right to select any one or more of the customary methods of discharge, if available at the time. "On the *Varing's* arrival on the 28th September, 1927, none of the customary methods of discharge for a cargo destined for Garston was available owing to congestion." The defendants were asked for particulars of what they meant by "customary methods of discharge," and in their further particulars they divide "customary methods of discharge" into two classes, first, "goods destined for Garston or which required sorting before being forwarded by rail in wagons," and secondly, "cargo that is destined for direct dispatch into main line wagons." As to the former, they say "they should be taken in 'red' or 'domestic' wagons to the storage ground."

My Lord has pointed out that these charterparties are of general application, and that in clause 13 they deal with a number of definite ways in which cargo may be discharged, some of which are appropriate for one port and some for another. It is said that the consignees have the right to select any one or more of these alternatives if customary or available at the time of discharge. There is little doubt, I think, upon the evidence that so far as customary alternative is concerned, that was the system of discharging into wagons. The question arises then whether such customary alternative was available. It is said that the wagons which were available were not the kind of wagons which were indicated in the intention of the parties and in the custom, because the only wagons into which the consignee could properly call for the goods to be discharged were "red" or "domestic" wagons, and the reason the defendants gave for that, as I read their

particulars, is that the cargo was destined for Garston itself or required sorting.

I do not find in the instrument any trace that one type of wagon is distinguished from another. I think that the customary and available methods that are there set out are alternative—not strictly alternative, because there are more than two—delivery into lighters, or into wagons, or into bogies, and the particular method here selected was that of wagons; and so far as that is concerned the railway company were prepared to discharge into main line wagons, and it is clear that that class of wagon was available. I cannot see any indication in the charterparty that the destination would be in any event anywhere but Garston. Garston was the port of discharge, and it was no concern of the ship's whether, after the goods were discharged at Garston, they were to be left at Garston or sent to Liverpool, or any other port of the United Kingdom. The obligation of the ship is to discharge at Garston "in the customary manner." That leaves only the alternative distinction, that the method of using "red" or "domestic" wagons must be invoked, when the cargo requires sorting. The learned judge has found upon that that these goods would require sorting. Although it is true that one witness, Mr. Topham, used language which might bear that construction, it is abundantly clear, when the facts of the case are considered and the letters written by the defendants themselves are considered, that they were under no such apprehension. On September 28, for example, in addition to what my Lord read, Messrs. Blake & Co. say: "We confirm telephone conversation with Mr. Thompson this morning when we understand that you propose giving this vessel a berth at 1 P.M. to-day, and that it is your intention to load the goods direct from ship into wagons." Now that means without sorting, and in the next sentence they say: "We agree to your adopting this course on the understanding that the charges would be the same as if the goods were handled at Garston and we understand this to be the case."

In my view, in the light of that letter it is for the defendants to say what sorting was necessary before the

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goods could properly be discharged. But there is, I think, a slight confusion of thought with regard to two different matters here. It may well be that it is the duty of the shipowner, where he carries a mixed cargo, to sort it before he delivers it. That is one thing; the question of the construction of this particular charterparty is another, and so far as this charterparty is concerned the obligation is to deliver into wagons, and the mere fact that sorting is there required—which may be required under the general law—does not justify the reading of the obligation as an obligation to deliver into "domestic" or "red" wagons in the way that has been contended for here by the defendants.

The result therefore of the evidence here is this: that on September 24 the goods could have been discharged into wagons in the customary manner, discharged into wagons by means of cranes at this port. It might have been possible, in spite of that, for the defendants to have argued that these goods were so mixed that in fact they physically required sorting, altogether apart from any construction of the charterparty. The evidence, however, is clear, that not only the goods of Mr. Blake, but the goods of Mr. Craig were delivered at Widnes. The learned judge is consequently mistaken in coming to the conclusion that they needed sorting. In my opinion, the defendants are without any defence to the claim for breach of contract, and I agree with my Lord that this appeal must be allowed to the extent, and with the consequences, that he has stated.

Solicitors for the appellants: *Alsop, Stevens & Collins Robinson, Liverpool.*

Solicitors for the respondents: *A. M. Jackson & Co., Hull.*

E. C. M. T.

PEAL *v.* PEAL.

1930
July 7.

Husband and Wife—Validity of Marriage of Christians celebrated in India—Prohibited Degrees of Consanguinity—Indian Law—British Subjects—Roman Catholics—Removal of Impediment to Marriage—Domicil.

The Indian Statutes relating to the marriage of Christians in India do not relax the general law of marriage with regard to British subjects of European origin. An impediment to marriage within prohibited degrees which is ordinarily imposed upon such British subjects by their personal law is not removed by a customary law of local observance or a dispensation under the authority of the Roman Catholic Church or any other religious community.

Suit by a wife for restitution of conjugal rights.

The question arising was that of the validity of the marriage of the parties celebrated in India in 1921. So far as the law of England is concerned they were within the prohibited degrees of consanguinity, the petitioner being the daughter of the paternal grandfather of the respondent, and on the ground of this impediment to marriage the husband, respondent in the suit, filed a cross-petition seeking a decree of nullity of the marriage.

The petitioner and respondent were at the time of the ceremony of marriage British subjects of the Roman Catholic faith resident in India, and a special dispensation had been granted by their proper ecclesiastical authority for the celebration of their marriage. The families of the parties had been for four generations resident in India and the fact of domicil or intention to acquire it were discussed at length, the petitioner contending for an Indian and the respondent for an English domicil, but assuming the fact of an Indian domicil the decision of the case turned on the law applicable in that event to the parties as British subjects in India and the possibility of the removal of the impediment to their marriage by that law. This report is directed to that question.

Sergeant Sullivan K.C. and *E. Holroyd Pearce* for the petitioner.

Cotes-Preedy K.C. and *Eric O'Donnell* for the respondent.

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PEAL v. PEAL.

[Expert evidence of the Indian law of marriage was given by a former Indian judge, *Sir Cecil Walsh K.C.* and *Mr. J. Nissim* a member of the Bar with judicial experience in India, and the substance of the respective cases sufficiently appears in the judgment.]

THE PRESIDENT (LORD MERRIVALE) [after dealing with the facts on the question of domicil and the difficulties arising thereon proceeded as follows :] Assume that at the time of the ceremony of marriage the petitioner and the respondent were domiciled within the dominions of the King-Emperor in India, what law determined their capacity to contract marriage ? The petitioner says it is the Anglo-Indian law as to the marriage of Indian Christians. The respondent asserts it to be the English law of marriage.

The marriage law which governs the conjugal relations of the English population in India, and of British and native Christians there, has come into being by sanction of charters and statutes of which the earliest needing to be noticed are the charters of the eighteenth century which constituted the Supreme Court under the regime of the East India Company. These are concisely reviewed in the judgment of the High Court of Calcutta delivered by Sir Arthur Wilson in the case of *Lopez* v. *Lopez* (1) on which counsel on both sides to some extent relied here. At the outset of the Company's regime the marriage law for British subjects of the Crown resident in India was that in force in the diocese of London and it was administered by the Supreme Court constituted under the charter. Side by side with the Supreme Court there existed the Mofussil Courts, which had jurisdiction over natives or other persons not being "British subjects of the Crown resident in India." These Courts had matrimonial jurisdiction and the law to be applied to cases of marriage not specifically provided for was "justice, equity and good conscience." In *Abraham* v. *Abraham* (2) it was held by the Privy Council that this

(1) (1885) I. L. R. 12 Cal. 706, 722.

(2) (1863) 9 Moore Ind. Ap. 195, 239.

"prescribed the referring the decision to the usages of the class to which the parties belonged."

Under the Company's regime British residents became subject in some questions affecting marriage to the jurisdiction of the Mofussil Courts; no one, however, has suggested so far as I know that they thereby fell under the customary law administered by the Mofussil Courts as between non-British subjects.

A Christian Marriage Act in 1851 (1), a Charter Act in 1861 (2) under which the High Courts were re-constituted, Christian Marriage Acts in 1864 (3) and 1865 (4) which dealt (inter alia) with the marriage of native Christians, a Divorce Act in 1869 (5), and the Indian Christian Marriage Act, 1872 (6), mark the progress of legislation so far as it is material to be observed. The last-mentioned Act contains a provision in the words following as to the prohibited degrees: "Nothing in this Act shall be deemed to validate any marriage which the personal law applicable to either of the parties forbids him or her to enter into." The general terms of the enactment and the absence of any specification of the prohibited degrees are matters which command attention. They result, it seems to me, from the fact that the Indian Government in its legislation as to Christian marriages in 1864, 1865 and 1872 had by successive enactments provided a comprehensive code of law which governed the celebration of marriages not only for British Christians whose unions had been provided for by the older laws but for native Christians and for Christian subjects in India of foreign states—that is for various classes of persons governed by different systems or codes of personal law.

It was inevitable that laws such as I have mentioned, operating in the complex political social and racial conditions which exist in India, should produce doubtful cases for decision in the Indian Courts, and some such cases, in

(1) 14 & 15 Vict. c. 40.
(2) 24 & 25 Vict. c. 104.
(3) Indian Act XXV. of 1864, repealed by (4).
(4) Indian Act V. of 1865.
(5) Indian Act IV. of 1869.
(6) Indian Act XV. of 1872, s. 88.

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addition to *Lopez* v. *Lopez* (1) were cited to me. Expert evidence was also given.

The respondent relied upon a text-book in use in India, "The Law of Divorce (India)," the work of the late Mr. Justice Rattigan, an Anglo-Indian lawyer of admitted distinction, and called Sir Cecil Walsh, for many years a judge of the High Court of Allahabad. The proposition of law affirmatively so adduced was that " as regards British subjects domiciled in India the personal law to which they are subject as regards capacity to contract marriage is the law of England as enacted by 32 Hen. 8, c. 38." (2)

On the petitioner's behalf evidence was given by Dr. Nissim, a member of the Bar who has had judicial and administrative experience in India, to the effect that the governing principle as to the capacity of Roman Catholics in India to contract matrimony " has been assumed to be that of the Church of Rome " and that " the personal law to be applied in respect of marriage is that of the religion of the parties."

None of the cases cited to me dealt directly with facts equivalent to the facts in this case. Marriage with a deceased wife's sister sanctioned by dispensations of Roman or Greek authorities was shown to have been held valid, but the parties were not British subjects. The necessity and efficacy of a dispensation in the case of marriage of parties within various degrees of relationship was also illustrated. The most helpful case cited was that of *Lopez* v. *Lopez* (1), to which I have already referred, which was dealt with by a full bench of the High Court of Calcutta in 1885.

Lopez v. *Lopez* (1) established the validity of a marriage celebrated under the Christian Marriage Act of 1872 between a man and his deceased wife's sister notwithstanding that by English law the marriage would have been invalid. The parties were non-British Christians and Roman Catholics. By the rules of the Roman Church in the non-British community to which the parties were shown to belong—not improbably

(1) I. L. R. 12 Cal. 706.
(2) Rattigan's Law of Divorce (India), p. 137.

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Goanese—marriage of parties so related could be had under dispensation of the ecclesiastical head of the community. Such a dispensation was found to have been obtained, and the High Court held the marriage valid.

Counsel for the petitioner did not suggest that *Lopez* v. *Lopez* (1) directly governs the present case. When the judgment delivered by Sir Arthur Wilson comes to be examined it will be seen not to give material help to the petitioner's case. What it does show is that when the statutory provision was made by the Government of India for the celebration of marriage in His Majesty's Indian possessions between Christians who are not British subjects in India they were not brought within certain statutory prohibitions by which British subjects in India are bound.

What is really in question here is whether British subjects in India who happen to be or who may become Roman Catholics are, as regards competency to marry, persons in a distinct and legally different class from their British fellow subjects. If they are, it would seem that of their own volition, contrary to general law, they may by marriage within the prohibited degrees create relationships and confer successional rights or interests in prejudice of the statutory rights and interests of their kinsfolk. Rights of inheritance and interests under the Statutes of Distribution could thus be conferred.

There is no trace in the statutes in question of any intention on the part of the Indian legislature to relax the marriage law as it relates to British subjects. In the latest of them the celebration of marriage of Christians, who are not British subjects: as well as of Christians who are is provided for. It did not apparently enter the minds of the learned judges who decided *Lopez* v. *Lopez* (1), or of the counsel who argued it, that the old law was relaxed as to Christians who are British subjects. The only question considered was whether without an express enactment to that end the legislative authority when it enlarged the facilities for Christian

(1) I. L. R. 12 Cal. 706.

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marriages and dealt with non-British as well as with British Christians must be assumed to have subjected Christians of non-British communities to restrictions not theretofore known to those communities; and the Court held that in the absence of express words this ought not to be assumed. Sir Arthur Wilson's judgment sums up the matter thus: "The policy of the Acts of 1865 and 1872 is not to extend the English rules as to prohibited degrees by legislation to persons not already governed by them."

I can find nothing in the Indian statutes which has relaxed with regard to the petitioner and the respondent the prohibition against marriage under which prima facie they came as British subjects in India. I must accordingly decree the ceremony of marriage had between them in India to have been null and void.

Solicitors for the petitioner: *Ellis & Willes and Ingpen & Armitage.*

Solicitors for the respondent: *Randolph & Dean.*

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March 26.

Probate—Will—Revocation—"Contemplation" of a Marriage—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *s.* 177.

The testator, being married to a woman who had left him some years before and had not been heard of, bequeathed the whole of his estate to a woman with whom he was living and whom he described as his wife. Shortly afterwards he married the woman in question, relying on the legal presumption of the death of his wife:—

Held, that the marriage was prima facie valid and that the will was expressed to be made in contemplation of it, and was accordingly within the protection of the section and not revoked by the marriage.

ACTION for probate in solemn form.

The question raised was as to the construction of the Law of Property Act, 1925, s. 177. (1) The plaintiff, who propounded a will dated February 12, 1927, of Frederick William Harcourt Pilot who died on February 19, 1930, claimed to be the widow of the testator, and universal legatee under the will in question. The defendants who were next of kin of the testator did not appear. In 1914 or thereabouts the testator married a woman, who left him in 1921 and had not since been heard of, and the testator had been unable to trace her. In 1924 he met the plaintiff and lived with her, and the Court was satisfied that the fortune of the testator was largely contributed to by her. On February 12, 1927, he executed the will in question, a holograph document, the material portion of which was as follows: "I herewith bequeath and leave to Diana Featherstone Pilot my wife all my worldly goods." On August 15, 1928, seven years having elapsed since the disappearance of the woman whom he had first married, the testator married the plaintiff.

G. C. Tyndale for the plaintiff. The marriage of the testator and the plaintiff was prima facie a good one. The presumption is against bigamy and in favour of the validity of my client's

(1) The Law of Property Act, 1925 (15 Geo. 5, c. 20), s. 177: "A will expressed to be made in contemplation of a marriage shall, notwithstanding anything in section eighteen of the Wills Act, 1837, or any other statutory provision or rule of law to the contrary, not be revoked by the solemnization of the marriage contemplated."

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marriage: *The King* v. *Inhabitants of Twyning*. (1) The marriage being good, there can be no reasonable doubt on the facts that the will was made in contemplation of it.

THE PRESIDENT (LORD MERRIVALE) [having dealt with the marriage of the plaintiff and the testator and concluded for its validity, proceeded:] At a time when this marriage was obviously within the contemplation of the testator, if he could validly contract it, he wrote out this holograph document, the material part of which is a bequest to the plaintiff, whom he described as his wife, of all that he had. According to the former law the document would now have been ineffective, but the testator must be taken to have had knowledge of the Act of 1925, which prescribes that the solemnization of his marriage shall not revoke his will made in contemplation of that marriage. Under the circumstances I do not think that it can be doubted that the will was in contemplation of the subsequent marriage and practically expresses that contemplation and is good.

Solicitors for the plaintiff: *Coulson & Coulson.*

(1) (1819) 2 B. & Ald. 386.

R. M. M.

STIBBE *v.* STIBBE.

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1931
Feb. 17, 18.

Divorce—Practice—Permanent Maintenance—Order of Registrar fixing Amount—Appeal to Judge—Jurisdiction of Judge to vary Amount—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 190—*Matrimonial Causes Rules*, 1924, *rr.* 45, 69.

The direction given by the Registrar under r. 69 of the Matrimonial Causes Rules, 1924, that an order on an application for maintenance or periodical payments should issue is a decision of the Registrar within the meaning of r. 45 of the same Rules and is therefore appealable. If the judge on the hearing of the appeal comes to the conclusion that the direction of the Registrar was wrong and ought not to have been made he can recall the order issued in pursuance of such direction and make such order as in his judgment he deems just. The judge on the hearing of the appeal should, of course, give due weight to the decision of the Registrar, and should be slow to disturb that decision on a mere question of quantum, unless it clearly appears from the proved facts that it would be wrong to allow the amount ordered by the Registrar to be secured or paid to stand.

Decision of Bateson J. reversed.

Appeal from a decision of Bateson J.

The only question calling for a report in this case was whether on an appeal from an order of a Registrar awarding permanent maintenance to the wife the judge has jurisdiction to interfere with the discretion of the Registrar in the matter of quantum.

The husband was a director of a private company from which he derived an income of between 6000*l.* and 7000*l.* a year. The wife was possessed of an income of 200*l.* The wife had obtained a divorce from her husband and an order for her permanent maintenance had been made by the Registrar under which the husband was ordered to secure to her an income of 1200*l.* a year free of tax and to pay her in addition a sum of 1000*l.* a year also free of tax, making together 2200*l.* a year.

From this order the husband appealed to Bateson J. on the ground that the sum awarded as permanent maintenance was, in the circumstances of the case, unreasonable.

Bateson J. confirmed the order of the Registrar, being of opinion that he had no jurisdiction to interfere with the

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exercise by the Registrar of his discretion in the matter of quantum, although he doubted whether he himself would have come to the same conclusion as the Registrar.

The husband appealed. The appeal was heard on February 17 and 18, 1931.

Bayford K.C. and *Noel Middleton* for the appellant. The question arising on this appeal is whether Bateson J. was right in holding that he had no jurisdiction to interfere with the Registrar's order for permanent maintenance as to the quantum to be allowed.

By s. 190, sub-s. 1, of the Supreme Court of Judicature (Consolidation) Act, 1925, the Court may, if it thinks fit, on any decree for divorce or nullity of marriage, order that the husband shall, to the satisfaction of the Court, secure to the wife such gross sum of money for any term, not exceeding her life, as having regard to her fortune, if any, to the ability of her husband and to the conduct of the parties, the Court may deem to be reasonable ; and by sub-s. 2 the Court may, either in addition to or instead of an order under sub-s. 1, direct the husband to pay to the wife during the joint lives of the husband and wife such monthly or weekly sum for her maintenance and support as the Court may think reasonable.

By r. 69 of the Matrimonial Causes Rules, 1924, upon an application for maintenance or periodical payments the pleadings when completed are to be referred to one of the Registrars who after investigation of the averments " shall direct such order to issue as to the maintenance of either party to the marriage or the children of the marriage as he shall think fit, or refer the application or any question arising therefrom to the judge for his decision." By r. 45 "An appeal from any order or decision of a Registrar may be made to a judge in chambers."

Here the Registrar has made an order for the payment by the husband of a certain sum to the wife by way of permanent maintenance and the husband has appealed to the judge against the order on the ground that the sum he has been ordered to pay is, in the circumstances of the case

unreasonable. The judge has, however, confirmed the order of the Registrar being of opinion that the question being one of quantum he had no jurisdiction to interfere with the discretion of the Registrar.

This is the first time that the question of the jurisdiction of the judge to interfere with the discretion of the Registrar as to matters of quantum has been raised.

There have, however, been cases in which judges have altered the amounts fixed by the Registrar. In *Jagger* v. *Jagger* (1) it was held that the amount fixed by the Registrar must be increased. In *Sherwood* v. *Sherwood* (2) the order of the Registrar was varied by the President by increasing the amount of the maintenance from 600*l.* to 1600*l.* a year. That case went to the Court of Appeal (3) and was there affirmed. Both those cases were decided after the Matrimonial Causes Rules, 1924, came into force.

The question in all these cases is what does the Court consider a reasonable sum to be allowed. Under the old practice the Registrar made a report to the Court and the Court made the order.

In *Hanbury* v. *Hanbury* (4) Jeune P. made an order for the allowance of a certain sum, the Court of Appeal varied the amount, and when the case came before the House of Lords the amount was again varied.

To say therefore that the judge has no jurisdiction to review these orders as to amount is quite wrong. Under r. 45 the Registrar may make an order but the appellant may come to the judge to review it.

Roland Oliver K.C. and *T. Bucknill* for the respondent. Where the Legislature has empowered a particular person to make an inquiry the preponderance of authority is that his decision ought not to be interfered with unless it is shown that he has gone wrong in some matter of principle.

Under the new procedure the Registrar has been selected as the proper person to deal with the amount to be allowed by way of permanent maintenance.

(1) [1926] P. 93.
(2) [1928] P. 215.
(3) [1929] P. 120.
(4) [1895] A. C. 417.

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[LAWRENCE L.J. If the judge said that he had no power to interfere with the order of the Registrar I think he went wrong.]

By r. 69 (A) of the Rules of 1924 the Registrar is empowered to make such order as to the maintenance of either party to the marriage or the children of the marriage as he shall think fit. Here the Registrar had the whole of the facts before him, and there is nothing to show that he proceeded on any wrong principle.

[LAWRENCE L.J. The Registrar has no power to make an order, but only to direct a Court order to issue.]

It is submitted that the Registrar's order is an order of the Court.

In *The Amerika* (1) Kennedy L.J. said the Court ought not "except in very exceptional circumstances, to interfere with the decision of the assessing tribunal unless some error in principle is pointed out or there is an obvious error in the calculations regarding figures, or a plain misunderstanding of some material portion of the evidence before the assessing tribunal." That statement applies in the present case.

Bayford K.C. replied.

LORD HANWORTH M.R. This is an appeal from an order of Bateson J., who confirmed the order which was made by the Registrar on an application made by the wife for permanent maintenance after she had obtained a decree of divorce against her husband. We are told that Bateson J. expressed the opinion, perhaps not at the time when he confirmed the order, but when the matter was brought to his attention again, that if he had the opportunity, or, indeed, the power to reconsider the matter he doubted whether he would have come to the same conclusion as that to which the Registrar came; but, acting upon what he conceived to be his duty, he thought that he had no jurisdiction in the circumstances to express an effective opinion. From that confirmation by Bateson J. the appeal is taken to this Court.

(1) [1914] P. 167, 184.

It is to my mind unnecessary to say anything about the jurisdiction of this Court upon an appeal, or the jurisdiction of the learned judge when the matter comes before him from the Registrar. It appears plainly from the cases which have been brought to our attention—and there have been quite a number of them in recent years—that the order of the Registrar can be reconsidered by the learned judge, and that from his decision an appeal lies to this Court.

Some comment was made on the fact that the order when ultimately made for reference bears the signature of the President of the Division; but though that may be the best method of giving the order authority, it does not indicate that the jurisdiction of the learned judge is excluded. I therefore say no more on the question of appeal, merely pointing to the cases to which our attention has been called.

Under s. 190 of the Supreme Court of Judicature (Consolidation) Act of 1925, power is given to the Court by sub-s. 1 on any decree of divorce if it thinks fit to order that the husband shall, to the satisfaction of the Court, secure to the wife such gross sum of money or annual sum of money for any term, not exceeding her life, as having regard to her fortune, if any, to the ability of her husband and to the conduct of the parties, the Court may deem to be reasonable; and by sub-s. 2 the Court may, either in addition to or instead of an order under sub-s. 1, direct the husband to pay to the wife during the joint lives of the husband and wife such sum for her maintenance and support as the Court may think reasonable.

The terms of those sub-sections have been considered in a good many cases, and rules have been laid down which are to guide the Court in deciding the amount which is to be paid to the wife. Let me take one clear rule in *Dayrell-Steyning* v. *Dayrell-Steyning* (1), where the learned President pointed out that in ascertaining the husband's total income the liability of the husband to King's taxes must be taken into consideration in order to arrive at the amount in truth disposable by him for his own purposes. Indeed, it is pointed

(1) [1922] P. 280, 282.

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out, and I think quite rightly, that all the expenses of earning the income, such as income tax, super tax, and other taxes and liabilities must be taken into account, sums by which that income is reduced and rendered no longer free to the full extent. Next, although the rule of one-third of the husband's income is a sound working rule to be followed generally, yet it is not an absolute rule. Thus in *Gilbey* v. *Gilbey* (1) it was laid down by the President that although the considerations which applied in the Ecclesiastical Courts to awards of alimony must have due weight in determining the proper award of maintenance to a wife after a decree of divorce, the assumption of a fixed arithmetical rule and an indispensable process of applying that rule is erroneous, and disregards the duty imposed by the section under which the ability of the husband and the conduct of the parties are to be considered to find out what is the reasonable amount. *Gilbey* v. *Gilbey* (1) was not cited to us in *Sherwood* v. *Sherwood* (2), but in this Court we laid down the same rule in that case. I observed there, without having knowledge at the time of *Gilbey* v. *Gilbey* (1), that the only remark I had to make was that "it would be a mistake to lay down that any rule has been reached as an absolute rule of law in all cases, which could not be varied if the circumstances demanded it." Generally one-third of the husband's income is adopted. It may be, as I have said, a good working rule, but in particular cases and under particular circumstances it might not be possible to adhere to that rule rigidly, and therefore whilst it is to be taken as a guide it is not to be taken as an absolute limitation.

In *Gilbey* v. *Gilbey* (3) it is to be noted that the figures of the husband's income were very large indeed, and the learned President applies good sense in saying that where you have an income far beyond what is necessary for what may be called domestic purposes leaving a balance disposable for external matters, the amount of the income affords no definite guidance as to what sum is required, and he refers

(1) [1927] P. 197. (2) [1929] P. 120, 124.
(3) [1927] P. 197, 201.

to one factor which should not be left out—namely, would the proposed maintenance which is given under sub-s. 1 be an adequate provision for maintenance of the petitioner if she had become a widow of the respondent?

We do not desire in any way to alter those rules or principles which have been laid down for the guidance of the Registrar, but we have to apply them to the facts of the present case. The order that was made was that the husband should secure to his wife an income of 1200*l.* a year free of tax; and, further, under sub-s. 2, pay her in addition a sum of 1000*l.* a year also free of tax. If you add those two together you get 2200*l.* a year. The wife herself was possessed of about 200*l.* a year, so her total income would be 2400*l.* a year approximately net, or at least as to 2200*l.* it would be free of all taxes. In order that the husband might provide that sum net it would be necessary for him to deplete his own income by an amount which I think could not be less than something like 2800*l.*; it might even be 3000*l.* a year, for the sum which he would pay over to his wife would, I think, be subject to deductions of income tax and super tax on the basis of his income. Whether or not the order of the Court would be sufficient to amount to a charge upon the income and so be deductible I do not know. It is not necessary to go into figures in detail, and we have refused that task. But I think I should not be going beyond the mark if I said, at any rate, that this order imposes a total liability upon the husband of something like 2800*l.* a year. Now, that is certainly a large sum, and one has to consider in accordance with the Act the ability of the husband and to see whether that sum is reasonable. It has been argued quite rightly by Mr. Oliver and Mr. Bucknill that on questions of amount the Court would be reluctant to interfere with the discretion of the Registrar. I quite agree that that is so if it was a matter of quantum; at the same time I think the figures themselves may present danger signals which are sufficient to require the Court to consider whether or not due regard has been paid to the ability of the husband and to the reasonableness of the sum reached.

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Mr. Stibbe puts an affidavit before the Court which seems to be complete and states his position without reserve. It is plain from that that although he has a considerable income, it is reduced to a net income of something like 6000*l.* to 7000*l.* a year. The Registrar discarded the question of a liability to pay a premium, and he brings the income to something over 7000*l.* a year. Of what is that income composed? It is quite plain when one looks at it that the income is almost entirely dependent upon the success of Messrs. Stibbe & Co., Ld., who are hosiery machinists of Newark Street, Leicester. A very large sum, almost half the income of the respondent, is derived from commissions on the sale of the hosiery machinery which his company sells, and he says that with regard to that the saturation point has been reached and it is very difficult now to find a further outlet for this machinery. Next, he says there is a particular factor in reference to this company, which is apparently a private company, that one of the so-called partners or directors is going out owing to advancing years and will take his money with him, and that it will be necessary for that money to be replaced by Mr. Stibbe himself. Next, he says that in the course of the last year or so business has fallen seriously. That seems in accord with the facts as we unhappily know them in the commercial world to-day. If I understand the Registrar aright, he took the facts of the past rather than the present, without any prognosis of the future, and he looked at what had been the achievements of this company down to a date just before the time when this affidavit was sworn, which was June of 1930. I have said in *Sherwood* v. *Sherwood* (1) that the Court must take into consideration not only what happened in the past, but what may happen in the future, and it is not reasonable to fix attention only on the past. That rule applies not merely as it did in *Sherwood* v. *Sherwood* (1) to the prospects of an increase of income, but also to the prospect of a decrease in income.

It would appear that the learned Registrar failed to take into consideration the information which could be derived

(1) [1929] P. 120.

from recent events contrasted with those a little further back from which the conclusion emerged that the business was not likely to do, at any rate for some little time, as well as it had done in the past. Next, it seems clear that although this income is derived from a company which has a good record, still it is entirely a business company, one which has to be fed with capital, to take advantage no doubt of fresh plant and fresh means of making the machinery and the like.

In view of all those circumstances it seems to me that a danger signal is lighted, because to say that a business man in this position with 6000*l.* or 7000*l.* a year ought to pay one-third of that income to his wife seems to impose too heavy a burden upon him. When the matter is looked into again it may be found that there is sufficient stability in the income to justify that, but having regard to what was said in the cases to which I have referred it appears to me very doubtful whether the payment of 2200*l.* a year free of all taxes is justified upon the facts and figures contained in the respondent's affidavit. In those circumstances it appears to me that the case is made out for sending this matter back to the Registrar for further consideration, not in any way interfering with matters in his discretion and not intervening in any matters of detailed figures, but merely on the ground that upon the facts disclosed he seems to have disregarded some of those rules which have been laid down in past cases and which by this judgment we desire to affirm and to adhere to. The appeal therefore will be allowed.

LAWRENCE L.J. I agree. Under s. 190 of the Supreme Court of Judicature (Consolidation) Act, 1925, there is jurisdiction to order the husband to secure to the wife gross or net sums of money and to pay monthly or weekly sums. This section replaces s. 1 of the Matrimonial Causes Act, 1907, which was repealed by the Act of 1925. By r. 69 of the Matrimonial Causes Rules, 1924, which were made under the provisions of the Matrimonial Causes Acts, 1857 to 1907, and which are still in force by virtue of s. 226, sub-s. 1 (*a*) of the Act of

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1925, the pleadings upon an application for maintenance and periodical payments are referred to the Registrar who, after an investigation of the averments therein contained, is charged with the duty of directing such order to issue for the maintenance of either party of the marriage as he shall think fit, or to refer the application to the judge for his decision. By r. 45 an appeal from any order or decision of the Registrar may be made to a Judge in Chambers. In my opinion, the direction given by the Registrar under r. 69 that an order on an application for maintenance or periodical payments should issue is a decision of the Registrar within the meaning of r. 45, and is therefore appealable; further, if the judge on hearing the appeal comes to the conclusion that the direction of the Registrar was wrong and ought not to have been made he can recall the order issued in pursuance of such direction and make such order as in his judgment he deems to be just. If this be the right view, the learned judge had in the present case jurisdiction to hear the appeal of the husband and to make such order on the wife's application as he thought right and just in the circumstances. The judge on the hearing of the appeal should, of course, give due weight to the decision of the Registrar, and should be slow to disturb that decision on a mere question of quantum unless it clearly appears from the proved facts that it would be wrong to allow the amount ordered by the Registrar to be secured or paid to stand. I understand that the learned judge thought that the amount ordered to be secured by the husband in the present case was unduly large in the circumstances, but considered that as it was a question of quantum he had no power to alter that amount. In my judgment, that view is erroneous. Moreover, I agree with the Master of the Rolls that there are circumstances in the present case which require the careful consideration of the learned judge in ascertaining the right amount to be secured. It must be borne in mind that the amount so ordered to be secured cannot be varied, discharged, or modified, as in the case of periodical payments, and in those circumstances it is especially important to have regard to the future prospects

of the husband in his business. In my opinion, therefore, the case should be remitted to the learned judge in order that he should make such order on the wife's application as to amount or otherwise as he thinks right and proper in the circumstances.

ROMER L.J. I agree, for the reasons given by the Master of the Rolls and Lawrence L.J., that this appeal must be allowed and the case sent back to be further considered.

I only desire myself to add this. I observe that in the order made by the learned Registrar the respondent is to pay two annuities both of which are to be free of tax. Now if free of tax means as prima facie it would appear to mean, free not only of ordinary income tax but of super tax, the result may be, and probably would be, that every year the liability of the respondent will be an increasing sum. And for this reason. The order to pay the two annuities of 1000*l.* and 1200*l.* free of income tax means that an annuity of 2838*l.* odd has to be paid in the first year, because that is the sum which, after deducting income tax at the rate of 4*s.* 6*d.* in the pound thereon, will leave 2200*l.* net. Now, for the purpose of super tax, the lady will in the following year have to bring into account an annuity of 2838*l.*, and the part of her super tax attributable to that annuity will have to be paid to her by the respondent free of tax and as an additional annuity. The result of this will be that in the third year the lady will for the purpose of super tax have to bring into account this additional annuity as well as the 2838*l.*, and the liability of the respondent will be pro tanto increased; and so it would be found that a sort of snowball arrangement will go on, and in the end his liability may be a great deal larger than I think even the learned Registrar contemplated it would be.

Appeal allowed.

Solicitors for appellant: *Field, Roscoe & Co., for Stone, Davis, Savige & Partridge, Leicester.*

Solicitors for respondent: *Lewis & Lewis.*

W. I. C.

1931
April 20, 21;
May 12.

TURK *v.* TURK.

DUFTY *v.* DUFTY.

Permanent Maintenance—Order to pay—Variation—Discretion of Court—Descending Income of Husband—Increased Income of Wife—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 *Geo.* 5, *c.* 49), *ss.* 190, 196.

Maintenance for a wife which the Court may order on the dissolution of a marriage and the jurisdiction to review an order for it are matters of discretion conferred on the Court by statute and not standardized by the rules applying in cases of judicial separation. The jurisdiction is now embodied in the Supreme Court of Judicature (Consolidation) Act, 1925, s. 190, sub-ss. 1 and 2, and if an order for maintenance is limited "until further order," the Court in reviewing it should regard all the present circumstances of the case as if they had existed at the date of the original order. It may consider not only the descending income of the husband but the ascending scale of that of the wife. Even in the absence of the limitation relevant facts as to the fortune of the wife may have weight in relation to the discretionary power to review, if occasion arises under s. 190, sub-s. 2, by reason of the inability of the husband to pay. The Court does not derive its power to review, an order for maintenance from s. 196 of the Supreme Court of Judicature (Consolidation) Act. The Act is a consolidating, not an amending one, and the latter section, having regard to its terminology, is limited in its operation to cases of restitution of conjugal rights.

Dicta of Lord Cozens-Hardy M.R. and Phillimore L.J. in *Hall* v. *Hall* [1915] P. 105 adopted.

THESE were motions arising on petitions for reduction of permanent maintenance referred by the Registrar to the Court. In both cases it was (inter alia) alleged as a ground for reduction that the means of the wife had increased.

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The wife obtained a decree absolute of dissolution of marriage in February, 1927. In due course she obtained a security order at the rate of 200*l.* per annum—and payment orders, for the joint lives until further order at the rate of 70*l.* per annum and 70*l.* per annum for a child of the marriage. The husband by his present petition for reduction alleged that his income, derived from stocks and shares, had diminished, and that of his wife, from house and other property and

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professional earnings, had increased. The findings of the Registrar's report appear in the judgment. The Registrar submitted to the Court the question whether the increase of the wife's means was a possible ground for the interference of the Court having regard to the language of the Judicature (Consolidation) Act, 1925, s. 190.

W. O. Willis K.C. (*Hon. Victor Russell* with him) for the wife. The material statute now in force is the Supreme Court of Judicature (Consolidation) Act, 1925, s. 190. This is now the only power enabling the Court to review the order. The power given by s. 196 is restricted in operation to cases of restitution of conjugal rights. The expression " periodical payments " or equivalent language there used is to be found in the statute only in ss. 187, 191, sub-s. 2, and 196 in connection with restitution of conjugal rights, and is borrowed from the Matrimonial Causes Act, 1884 (47 & 48 Vict. c. 68). The only authority for the husband's contention that he can rely for a reduction on increased means of the wife is to be found in certain obiter dicta in *Hall* v. *Hall* (1), which is not an express decision on the point. If such was the intention of the Legislature it is casus omissus in the statute and its predecessor, 7 Edw. 7, c. 12 (Matrimonial Causes Act, 1907), which it repeals : *Sharpe* v. *Sharpe.* (2)

Bayford K.C. (*H. B. Durley Grazebrook* with him) for the husband. In *Hall* v. *Hall* (1) the Court of Appeal has given the words of the statute a wider construction than that contended for on the other side, and the Court must consider all the original circumstances as now modified as if it were considering an original application under s. 190, sub-s. 1.

Willis K.C. in reply. The power to make a further order must depend on the grounds precisely specified in the statute. The wife's fortune is immaterial.

Cur. adv vult.

May 12. THE PRESIDENT (LORD MERRIVALE). This motion, and one of a similar nature in a case of *Dufty* v. *Dufty*, heard at the same sittings, arose upon petitions referred from the

(1) [1915] P. 105. (2) [1909] P. 20.

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registry for argument in Court under a direction given by reason of difficulties in point of principle which have been found to arise in the exercise of the judicial discretion directed by statute to be exercised in cases of various kinds where, upon divorce, pecuniary claims are made by the divorced wife upon the divorced husband with a view to secure permanent support or financial help notwithstanding that the marriage is dissolved. Such cases have of course a social reaction, besides being of personal importance to the parties.

Any claim there is on the part of a wife after divorce to any pecuniary provision from the divorced husband is wholly dependent on statutory enactments. It has no foundation in the well known common law principle, the basis of the old procedure of the ecclesiastical Courts, which requires a husband to provide maintenance for his wife according to his means. That obligation and the resultant right are enforced in this jurisdiction in cases of judicial separation on the same lines as were followed by the ecclesiastical tribunals before the Matrimonial Causes Act, 1857. What is here in question is a wholly different matter. This reminder is needed, because in maintenance cases in divorce there seems to be an irresistible tendency to take into account the settled rules of long standing which control the discretion of the Court in granting alimony upon a decree for judicial separation.

It is well to bear in mind further that the power the Court has to decree a settlement out of the fortune of a divorced husband, discretionary as it is, came into being while the ancient doctrine of English law, that the husband and wife became upon marriage one person, had full legal effect. The wife's property had vested in her husband by virtue of the marriage, and in her own legal capacity she could not have separate estate. Even the ancillary power to order a divorced husband to provide monthly or weekly payments for or toward the maintenance of the divorced wife—likewise a discretionary power—came into being before any of the statutory enactments which in the past sixty years or so have given to married women in the well to do classes the

position of propertied independence in which in point of law they now are.

A collateral fact of some importance is this, that since 1923 the grounds on which a wife may obtain dissolution of her marriage have been broadened by making an isolated act of adultery a ground for divorce at the wife's choice as at the husband's.

In the present case a decree nisi of dissolution of marriage was granted to the wife in respect of the husband's adultery, and was made absolute on February 2, 1927. By the decree the custody of a son now fourteen years old was given to the wife. In due course the wife applied for and obtained an order for permanent maintenance, whereby the husband was ordered to secure to her 200*l.* a year for the term of her life, with further orders that he should pay her in addition by monthly payments 70*l.* a year during their joint lives until further order, and should pay at the rate of 70*l.* a year for the maintenance of the child of the marriage. The case comes before the Court now upon cross-petitions in respect of maintenance. The petition of the husband, which opened the proceedings, prays for a reduction in the amount of the maintenance ordered in 1927 on the ground (*a*) that his income, arising from stocks and shares, has diminished since the date of the order, and (*b*) that the respondent in the meantime has become entitled under the will of her late father to the rents of valuable leaseholds in London, and has other after acquired property, and follows a profession in which she "earns her living."

The wife's answer to the husband's application is that his income has not substantially decreased, that her possible income from the leaseholds in question is no more than 285*l* a year, that she does not earn her own living in manner alleged or otherwise, and that her after acquired property, the amount represented by a policy of life assurance, has been realized and invested in War Savings Certificates for the benefit of the child of the marriage.

Pending these proceedings on the husband's application, the wife filed a petition seeking an order for an increase

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of the amount payable by the husband in respect of the maintenance and education of the son. This application was contested by the husband.

Evidence was heard in the registry, and the Registrar's report on the facts with a recommendation annexed thereto formed the basis on which the case has been argued here.

The provisions of the order of 1927, and the precise nature of the statutory jurisdiction, as now embodied in the Supreme Court of Judicature (Consolidation) Act, 1925, must be kept clearly in view. The order in its material form is that: "The respondent do, out of his present income, and until further order of the Court, pay or cause to be paid to the petitioner during their joint lives maintenance at and after the rate of 70*l.* per year less tax payable monthly from date of decree absolute, ... and a further sum of 200*l.* per year less tax payable likewise for her life to be secured, ... (upon stocks enumerated) . . . . and a further sum of 70*l.* per year for the maintenance and education of the child of the marriage, ... payable monthly. Liberty to apply."

It is noticeable that the several provisions of the order do not read in their proper sequence, having regard to the fact that a monthly or weekly allowance for maintenance is under the statute ancillary, additional to, or substitutional for the order for a settlement. Stated with due regard to this consideration, what is provided is that under s. 190, sub-s. 1, of the Act of 1925, the husband is ordered to secure to the wife 200*l.* a year for her life; under s. 190, sub-s. 2, he is ordered to pay in addition to this annuity 70*l.* a year less tax payable monthly, until further order; and under s. 193 he is ordered to pay 70*l.* a year payable monthly for or toward the maintenance and education of their son.

The report shows that the order made in 1927 proceeded on the footing that the husband's income was 1126*l.* a year, derived from invested funds and money at interest, and the wife's 160*l.* derived from sources no longer existing. The husband's present resources are investments producing an income of 1014*l.* gross, and a freehold house worth 100*l.* a

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year, together equivalent to 1114*l.* a year. The wife's income from ascertained assets is stated at a gross annual value of 340*l.* The wife and her son live with her mother, and she contributes to the housekeeping 3*l.* a week. The learned Registrar estimates this contribution as equivalent to the value of the maintenance received. For the husband it was argued that this is a substantial undervaluation.

On the facts as found the learned Registrar states as his opinion that a diminution in annual income from 1026*l.* to 1014*l.* is too small to warrant a reduction of the order of 1927. As to the undoubted increase of the wife's means since 1927 he submits as a doubtful question whether there is jurisdiction on that ground to reduce the maintenance decreed. If there is jurisdiction under s. 196 of the Act he recommends that the monthly payments should cease.

With regard to the wife's application for increased payments on account of the son, the position is that he has been entered as a day boy at Westminster School, subject to school fees of about 120*l.* a year, and the Registrar recommends that the father's payments should be increased from 70*l.* to 150*l.* a year, as prayed by the mother.

As to the law to be applied counsel for the husband argued that on the true construction of the statute—Supreme Court of Judicature (Consolidation) Act, 1925, s. 190, sub-s. 2—whenever a question is properly raised which calls for review of monthly or weekly sums payable to the wife after a decree of divorce, the same matters must be considered which are prescribed in s. 190, sub-s. 1, to govern determination of the sum which the Court may order to be secured: that is to say, the payments to be made must be "such . . . . as having regard to her fortune, if any, to the ability of the husband, and the conduct of the parties the Court may deem to be reasonable." He argued that this is the proper effect to give to the two provisoes to s. 190, sub-s. 2 (*a*) and (*b*), and that whenever a question is raised under either of them the Court is placed by the statute under an obligation to consider it on the footing of the three matters specified in s. 190,

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sub-s. 1: "The wife's fortune, if any, the ability of the husband, and the conduct of the parties." The whole subject, he argued, must be considered de novo, even though the application is only made under the provisoes. Counsel for the wife submitted that the only grounds of variation open to consideration by the Court are those specified in the provisoes. As to proviso (*a*) his case was that the husband has not become unable to make the prescribed payments. As to (*b*) no case was suggested to have arisen. He submitted that s. 196 of the Supreme Court of Judicature (Consolidation) Act, 1925, whereby the Court may from time to time vary or modify any order "made under the provisions of this Act for the periodical payment of money" has no application in cases of divorce, and relates only to "periodical payments," usually so called in the recognized terminology in matrimonial causes, that is the periodical payments which are ordered to be made in suits for restitution of conjugal rights. His opponent did not challenge this contention.

The series of legislative enactments which are embodied in the sections under discussion of the Supreme Court of Judicature (Consolidation) Act, 1925, are the outcome of a progressive development in the jurisdiction of the Court in respect of the financial relations of divorced persons; under the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 32, there was given power to decree against a husband a pecuniary settlement in favour of the wife to be secured upon his real or personal possessions; under the Matrimonial Causes Act, 1866 (29 & 30 Vict. c. 32), s. 1, power was given in lieu of or in addition to such a settlement to order monthly or weekly payments by the husband for maintenance subject to suspension or diminution "if the husband becomes unable to make the payments"; and under the Matrimonial Causes Act, 1907 (7 Edw. 7, c. 12), s. 1, sub-s. (2) (*b*), an additional power was introduced to increase the sums payable if the husband's means shall increase.

The difference in character of the compulsory financial settlement by a divorced husband which was provided for

by the Matrimonial Causes Act, 1857, s. 32, and the payments for or toward maintenance of the wife after divorce, which originated in the Matrimonial Causes Act, 1866, and was varied in the Matrimonial Causes Act, 1907, cannot be disregarded; the settlement under s. 32 was and is final, irrevocable and unalterable, though it is made in the exercise of a wide discretion. Having regard to the terms of the Matrimonial Causes Act, 1866, it may well be that as to monthly or weekly allowances for maintenance additional to or substitutional for settlement the legislature had in view the definitive nature of the provisions in s. 32 of the Act of 1857, and I think it would probably have been held in respect of an order made simpliciter in the terms of the Matrimonial Causes Act, 1866, s. 1, that it was a condition precedent to any application for review, that since the order the husband had become "unable to make the payments." The position now is not so plain. There are later enactments, and the language of the original Acts has received authoritative explanation. In a case of *Hanbury* v. *Hanbury* (1), which arose in the House of Lords in 1895, upon consideration of the Matrimonial Causes Act, 1857, s. 32, as compared with the Matrimonial Causes Act, 1866, s. 1, Lord Herschell (then Lord Chancellor) gave a broad meaning to the words "unable to make the payments." That the husband's income exceeded the sums prescribed was not taken as decisive. Lord Herschell stated as his view—and apparently Lords Watson, Macnaghten and Shand concurred in it—that under the Matrimonial Causes Act, 1866, s. 1, the order on the husband could be altered so as to meet the case of any substantial diminution of the husband's income.

Again in *Hall* v. *Hall* (2) the Court of Appeal had to consider the effect of the enactments now embodied in the Supreme Court of Judicature (Consolidation) Act, 1925, s. 190, sub-s. 2, of the words "if the husband . . . . becomes unable to make such payments." It was a case where the husband's income, though reduced, was well beyond in actual amount the monthly sums ordered

(1) [1895] A. C. 417. (2) [1915] P. 105.

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to be paid. Lord Cozens-Hardy said this (1): "When an application is made for revision and when the original order has been made 'until further order' it seems to me that the Court ought to have regard to all the circumstances of the case in the same manner as if those circumstances had existed at the date of the original order." Phillimore L.J. agreed, and added something very material for consideration here. "It is admitted," he says, "that .... the Court is able to vary [the order] seeing that it was only made 'until further order.'" "It may be the language of the statute (as to the wife's increased income) is not so expressed as to enable the Court to make an alteration, but the statute does not tie the hands of the Court when they were free before, and this order, which is evidently in the common form, very wisely and properly allows the Court to reconsider not only the position of the husband but the relative positions of the husband and wife with regard to their property; and as the Master of the Rolls has just said, it would be very proper for the Registrar to consider not only the descending scale of the husband's income, but the ascending scale of the wife's, and to make an order accordingly."

The order in *Hall* v. *Hall* (2) was, as Phillimore L.J. pointed out, limited by the words "until further order." So is the material part of the order of 1927, which is now under consideration. A good many years have now elapsed since —probably because of the difficulties which experience showed to spring up when the full statutory authority of the Court, as to a wife's maintenance after divorce, was exercised once and for all—orders of this class came as matter of course to be drawn with the limitative term "until further order." The words are part of the common form of order in cases of provision for maintenance after divorce as well as in cases of alimony after judicial separation. In the discussion of the case attention was concentrated chiefly on the language of the statutes. For practical purposes the words of the order under appeal seem to me to be not less important.

(1) [1915] P. 109. (2) [1915] P. 105, 109.

An order expressed to be made "until further order" is in truth an order ad interim. Where it proceeds upon the footing of facts judicially ascertained the term "until further order" does not warrant any new application while the facts are substantially unaltered, and the Court has various means of protecting suitors and safeguarding the orderly conduct of business against abuses of such a kind. Further, the words do not confer a power of variation of the order made in the first instance beyond what is inherent in the statutory jurisdiction which is being exercised. But where the statute warrants it and the facts of the case require it the reserved power which is evidenced by the limitation of the order is of very great importance. The old well regulated practice as to alimony upon judicial separation evidences this; and it is additionally necessary to be kept in mind when, as between parties whose marriage has been dissolved, the Court is called upon to exercise a discretion as to whether it shall require one of them "to maintain the other."

Take the various provisions in the Supreme Court of Judicature (Consolidation) Act, 1925, s. 190 seriatim, those which apply to fixed settlements and to the provision of maintenance as between divorced persons, and they will be found to have one underlying term: the Court must in every case as it arises exercise its discretion. As to fixed settlements some elementary factors are specified, the wife's fortune, and the ability of the husband, meaning in the terminology of the ecclesiastical Courts his "faculties" and the conduct of the parties; but always what is to be ordered is what "the Court may deem to be reasonable." As to maintenance by monthly or weekly payments the Court "may" if it thinks fit "order such monthly or weekly sum . . . . as the Court may think reasonable." From the time of the considered judgment in *Fisher* v. *Fisher* (1), in which Sir Cresswell Cresswell as Judge Ordinary expounded for the first time the meaning and effect of the Matrimonial Causes Act, 1857, s. 32, and its relation to the old law of alimony, down to this day, the

(1) (1861) 2 Sw. & Tr. 410; 31 L. J. (P. & M.) 1.

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considerations of policy and justice which ought to govern a compulsory apportionment of means of the husband after divorce at the instance of the wife have had to be kept in view in applying that enactment and those which have supplemented it. Sir Cresswell Cresswell when the subject was bare of authority spoke of his task as "The arduous duty of deciding what is reasonable in the case," and examined every relevant matter. What, if anything, was reasonable as a fixed provision was determined. So now a judge must decide what is reasonable by way of monthly or weekly payments toward maintenance, in the first instance, and whenever the question is properly raised. I emphasize this once more because of the tendency which constantly shows itself to apply in the difficult controversies which arise as to claims by wives for maintenance after divorce the comparatively simple and practically uniform process which the ecclesiastical Courts evolved for dealing with the wholly different subject of a wife's right to alimony during judicial separation.

In view of the form of the order here the question so much discussed at the hearing whether under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 196, a final order for monthly or weekly payments could be varied upon an application not grounded upon proviso (*a*) or proviso (*b*) of s. 190, sub-s. 2, is perhaps of no more than academic interest. My own opinion inclines to the view that it could not. For reasons which I will state in dealing with the case of *Dufty* v. *Dufty* I think that counsel is right in saying that s. 196 of the Act gives no power in this behalf.

Having regard to what I have said, how ought this order of 1927 in the present case to be dealt with under the applications of the respective parties? As to the husband's means, in 1927 his permanent resources brought him in 1126*l.* a year, now they represent an annual value of 1114*l.* Apart from variation of the wife's means an application to modify his liabilities as to maintenance in respect of the sum payable monthly, which is the only modifiable part of the liability, would be grotesque. What then is the true position of the

wife as to "fortune" and how does this affect the matter? She has a gross annual income of 365*l.* apart from what the husband may provide, and lives with her mother, making a weekly contribution to housekeeping. Counsel impressed upon me that the wife's household arrangements, whereby she gets board and lodging for herself and son for 3*l.* a week, represent a greater value than the sum she pays, and suggested that in truth her mother is still helping her to the value of 100*l.* a year. The Registrar considered this matter, and reports adversely to this contention. On the whole I think I am not called upon to give effect to it.

The true effect of the report is that if there is statutory authority the Registrar considers that a monthly payment should cease. His attention was directed to s. 196, but not, as it seems, to the limited nature of the order.

Once the order of 1927 comes lawfully under review regard must be had to all matters relevant to the exercise of judicial discretion. In fixing the secured income and the unsecured payments in 1927 the fortune of the wife as well as the ability of the husband was a proper and apparently a prescribed factor. Prescribed or not, it enters into the discretionary judgment which is to be now arrived at. The improvement in the wife's fortune is a substantial improvement, and on the whole facts I think that until further order the husband's liability for the wife's maintenance may properly be limited to the 200*l.* a year secured to her by the settlement.

The wife's application for increased maintenance for the child of the marriage must also be considered. As to this there is no question of jurisdiction or as to the material facts. The recommendation in the Registrar's report is for an increase to 150*l.* a year. I regard this as a reasonable recommendation, and until further order the payment of the husband in this particular must be upon the footing so recommended.

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In this case a decree absolute was pronounced in 1929 at the instance of the wife, and an order on the husband to pay 8*l.* per week, free of tax, as permanent maintenance until

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further order was made by consent in January, 1930. This was on the basis of the means of the wife being nil and those of the husband 1978*l.* 7*s.* 4*d.* per annum, subject to tax. In May, 1930, the wife married again, and on June 21, 1930, the husband filed his present petition for reduction of maintenance, alleging that the means of the wife had substantially increased by reason of the financial position of her second husband as well as on her own account. Subsequently by an amendment of his pleadings the first husband alleged as further ground for reduction the decrease of his own means since the date of the original order, and obtained an ad interim reduction to 6*l.* per week. The Registrar reported that at the present time the means of the first husband were 1766*l.* 13*s.* and those of the wife nil, apart from the husband's payments under the order.

Norman Birkett K.C. (*J. Neal* with him) for the husband referred to *Hall* v. *Hall* (1) and the Supreme Court of Judicature (Consolidation) Act, 1925, s. 196.

Leslie Marks for the wife referred to *Sherwood* v. *Sherwood.* (2)

[The arguments dealt chiefly with the figures of income and a suggested inability of the husband to pay owing to the declining tendency of his income. The conclusions on these points appear in the judgment.]

Norman Birkett K.C. in reply.

Cur. adv. vult.

May 12. THE PRESIDENT (LORD MERRIVALE). In this case the wife petitioned for dissolution of marriage, and obtained a decree. There was an order by consent for alimony pendente lite at the rate of 8*l.* a week free of tax. Decree absolute was granted on December 16, 1929, and on January 8, 1930, an order was made by consent for payment for maintenance at the same rate during joint lives of the parties or until further order.

On June 21, 1930, the divorced husband filed a petition for reduction of the maintenance provided for by the order of January 8, alleging as grounds that the divorced wife had

(1) [1915] P. 105. (2) [1929] P. 120, 124.

married a man of substantial fortune and that her own means had increased and her financial position had improved. An answer was filed denying these assertions, and asserting the new husband of the divorced wife to be a motor mechanic not of substantial means and unable to provide more than 4*l.* a week toward their joint housekeeping, so that she remained dependent on the payments of the former husband. In course of the controversy on the facts raised by the petition and answer the petitioner obtained leave to amend his petition by pleading that his means had decreased since the date of the order, and so amended it, and obtained a reduction ad interim to 6*l.* a week free of tax.

The report of the learned Registrar discloses some facts which are not in question. This present husband of the wife has substantial means, which are invested in an off licence publican's business, and small house property producing an annual net income of 518*l.* On their marriage he conveyed to the wife house property at Acock's Green, in need of substantial repairs, but of such value that after the repairs, said now to be about complete, the houses should yield the owner a net return of 190*l.* a year. She also retains a house and furniture and insurance policies which she had at the time of the divorce, and of the consent order of January, 1930, to the acquisition of which the first husband had contributed.

The first husband's income is derived from a business as an auctioneer and estate agent and from accumulated moneys. His profits for three years 1927–1929 inclusive, averaged 1978*l.* 7*s.* 4*d.* gross, but during 1930 his business which had brought in 1721*l.* in 1929, gave a profit of only 587*l.*

The learned Registrar has accepted the evidence given by and on behalf of the wife to the effect that her present husband gives her no more than 4*l.* a week towards her housekeeping, and that although he has conveyed some houses to her he has done so on the condition—as they both affirm —that he shall receive the rentals for his own use during their joint lives.

On the footing of the facts admitted or found, the Registrar reports that taking the total of the three years,

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1928 to 1930 the husband's average income was 1766*l.* He finds further that apart from the house and furniture and insurance policies which she had at all material times, and the new husband's contribution to the expenses of their housekeeping, her sole income is derived from the petitioning husband's payments under the order of January, 1930.

Looking at the facts so found the Registrar points out that a third of the income in view as income of both parties would be nearly 588*l.* subject to income tax, and that the consent order provides for payments at the rate of 416*l.* free of tax.

This reference to a third of the income is apparently a reference to the practice as to alimony after judicial separation in everyday cases whereunder a wife's income will ordinarily be made up to one-third of the joint income, and this allusion calls for the warning observation that the maintenance which the Court may in its discretion order to be provided after dissolution of marriage for the divorced wife is not standardized by the law and the rules which apply after judicial separation. It is the monthly or weekly sum which the Court in its discretion may think reasonable.

On behalf of the divorced husband it was contended at the hearing that at the material time his income had decreased, so that within the meaning of the statute, the Supreme Court of Judicature (Consolidation) Act, 1925, s. 190, sub-s. 2, he had become unable to make the prescribed payments, and the authority of *Hall* v. *Hall* (1) was relied on. It was further urged that in coming to a conclusion on this question the Court must exercise its discretion on like terms as in cases under s. 190, sub-s. 1, with due regard to the matters prescribed there for consideration, and ought not to disregard the wife's "fortune." As to this the Court was invited to hold that the Registrar had been misled as to the wife's present position and means. Further reliance was placed for the husband on the terms of the Supreme Court of Judicature (Consolidation) Act, 1925, s. 196: "The Court may, from time to time, vary or modify any order for the periodical payment

(1) [1915] P. 105.

of money under the provisions of this Act relating to matrimonial causes and matters." The last mentioned contention was not relied on in *Turk* v. *Turk*, and I will deal with it separately. Sect. 196 was said to confer a power of universal application in matrimonial causes, including divorce, and if the language of the section be given the widest possible meaning the words in their generality might be so construed. To construe them thus, however, would be to interpret the Act of 1925 as making a manifest new departure, whereas the Act is, as its title declares, a Consolidation Act only. This being so, attention must be paid to the provisions of the consolidated enactments in order to ascertain whether the words " any order for periodical payments " have the wide meaning sought to be given them, whether they are in truth a provision to enable the Court to vary an order in divorce under s. 190, sub-s. 2, directing the husband to pay to the wife a monthly or weekly sum for her maintenance. Sect. 190, sub-s. 2, when it comes to be read, defines by proviso the occasions on which the Court may vary such an order, and its terms do not tally with the terms of s. 196. Moreover, there is a section in the Act, s. 187, re-enacting the provisions of the Matrimonial Causes Act, 1884, s. 2, which shows the statutory meaning of the words " periodical payments." These are under s. 187 the payments ordered to be made to a wife by a husband who disobeys an order for restitution of conjugal rights.

The Matrimonial Causes Act, 1884, went on in s. 4 to empower the Court from time to time to vary or modify any order for the " periodical payment of money," dealing with such orders as a recognized class. The terms descriptive of various kinds of payments familiar enough in the practice in matrimonial causes are found in a series of sections in the Supreme Court of Judicature (Consolidation) Act: " gross sums of money," " annual sums," " payments monthly or weekly," " alimony," " provision . . . . with respect to maintenance and education of children." To none of these payments does the language of s. 196 apply, as an experienced practitioner in divorce would

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understand it. It applies perfectly, however, to the payments described in s. 187, and in my opinion s. 196 merely re-enacts, with regard to payments under s. 187, that which has been the law in respect of them from the time of the passing of the Matrimonial Causes Act, 1884. To hold otherwise would, as I have said, be to construe the Act of 1925 not as a Consolidation Act but as an amending Act. (1)

Apart from the question as to s. 196, which I have dealt with, this case is, I think, governed by the principles which I have endeavoured to state in the case of *Turk* v. *Turk*. I am not convinced that an order appearing on its face to have been made definitely to determine once for all what monthly or weekly contributions a divorced husband should make towards the maintenance of a divorced wife could be made the subject of a petition for variation for any other cause than those set forth in the two provisoes.

But that in no way concludes the matter. In the present case the order of January, 1930, is expressed to have effect for the joint lives of the parties or "until further order," and application is now made for "further order."

If I were satisfied that at the date of this application the means of the divorced husband had diminished so that he had a business income of less than 600*l*. a year, I should hold under *Hall* v. *Hall* (2) that his continued ability to pay must

(1) See *Abbott* v. *Abbott* [1931] P. 26.

Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49).

Sect. 190, sub-s. 1: "The Court may, if it thinks fit, on any decree for divorce or nullity of marriage, order that the husband shall, to the satisfaction of the Court, secure to the wife such gross sum of money or annual sum of money for any term, not exceeding her life, as having regard to her fortune, if any, to the ability of her husband and to the conduct of the parties, the Court may deem to be reasonable, and the Court may for that purpose order that it shall be referred to one of the conveyancing counsel of the Court to settle and approve a proper deed or instrument, to be executed by all the necessary parties, and may, if it thinks fit, suspend the pronouncing of the decree until the deed or instrument has been duly executed.

(2.) In any such case as aforesaid the Court may, if it thinks fit, by order, either in addition to or instead of an order under sub-s. 1 of this section, direct the husband to pay to the wife during the joint lives of the husband and wife such monthly or weekly sum for her maintenance and support as the Court may think reasonable:

(2) [1915] P. 105.

be now considered. That, of itself, would not raise as to the divorced wife the question of her "fortune" within the meaning of s. 190, sub-s. 1, of the Supreme Court of Judicature (Consolidation) Act, 1925. But the facts as to her "fortune" would no doubt have some weight in relation to the exercise of the discretion under the words in s. 190, sub-s. (2) (*a*), "as the Court thinks fit."

Again, if the Registrar had found that at the date mentioned the divorced wife possessed the resources she was asserted by the divorced husband to possess, I should deem it necessary now to determine whether the order made in January, 1930, to operate until further order, ought forthwith to be varied.

As matters stand I have not material before me on which I ought, as the husband's counsel asked me to do, to set aside the conclusions of the Registrar. The evidence, nevertheless, shows facts which are in course of development, so that no very great change in the situation might warrant a new order.

Under the circumstances I propose to allow the petition on which the case has arisen to stand over for six months, and at the end of that time either party may apply to have it disposed of with liberty to add to the evidence as the circumstances then existing shall require.

Leave to appeal.

Solicitors: *J. J. Edwards* for the wife; *Berrymans* for the husband in *Turk* v. *Turk*. *Gibson & Weldon*, for *J. H. Gunnell & Spiro, Birmingham*, for the wife; *Jackson & Jackson*, for the husband in *Dufty* v. *Dufty*.

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Provided that:—

(*a*) if the husband, after any such order has been made, becomes from any cause unable to make the payments, the Court may discharge or modify the order, or temporarily suspend the order as to the whole or any part of the money ordered to be paid, and subsequently revive it wholly or in part as the Court thinks fit; and

(*b*) where the Court has made any such order as is mentioned in this sub-section and the Court is satisfied that the means of the husband have increased, the Court may, if it thinks fit, increase the amount payable under the order."

Sect. 196: "The Court may from time to time vary or modify any order for the periodical payment of money made under the provisions of this Act relating to matrimonial causes and matters either by altering the times of payment or by increasing or diminishing the amount, or may temporarily suspend the order as to the whole or any part of the money ordered to be paid, and subsequently revive it wholly or in part, as the Court thinks just."

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Divorce — Practice — Adultery — Evidence — Wife's Petition — Admission by Husband of Adultery with unknown Woman—Refusal of Husband to disclose Name—Proof of Adultery—Right of Wife to Decree—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 178, *sub-s.* 3; s. 198.

On an undefended petition by a wife for dissolution of marriage by reason of the adultery of her husband, the evidence was that the husband passed two nights in a bedroom at an hotel with a woman. He then informed his wife of the fact, but disclosed no name or address of the woman in question either to his wife or to her solicitors or to the King's Proctor to whom the papers in the case had been sent by the Court, although both the solicitors and the King's Proctor applied to him for these particulars. As the result of inquiries by the King's Proctor there was no evidence of any association of the husband with a woman other than his wife, still less of illicit association:—

Held, by Lord Merrivale P., that although there was complete formal evidence such as would justify a finding of adultery if the Court thought it meant adultery had been committed, there was no evidence to show that the husband was likely to be guilty of promiscuous adultery, or of any kind of intimate association with any woman, much less of an illicit association, and therefore adultery was not proved.

On appeal by the wife.

Held, by the Court of Appeal (reversing the decision of Lord Merrivale P.), that the appeal must be allowed and a decree nisi granted on the ground that if evidence were tendered in good faith which under all usual circumstances clearly pointed to adultery, it was the duty of the Court to act upon it, unless the King's Proctor could adduce cogent evidence to rebut the obvious conclusion, and that in the present case there were circumstances on which the Court ought to be satisfied in accordance with what had hitherto been the practice that adultery had been established.

Per Romer L.J.: It was not apparent what difference the disclosure of the name of the woman would have made.

Wife's Petition for divorce.

The parties were married on April 11, 1926. In December, 1928, serious differences arose between the husband and wife, and in January, 1929, the husband left the wife. In July she received a letter from him in which he said: "As we have both been separated from each other for some months now, I think it only fair to both of us that I should give you grounds of divorce. I have therefore enclosed an hotel bill as evidence where misconduct took place. I trust that this

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will be sufficient, and thus release us both when each of us can find our own happiness."

The wife thereupon presented her petition for the dissolution of her marriage with her husband on the ground of his adultery with a woman unknown.

The petition, which was undefended, came on on March 31, 1930, before Hill J., who held that the wife was quite innocent, but that she had to prove the adultery, and adjourned the petition for further inquiries with the object of discovering the woman's name.

The wife's solicitors accordingly wrote to the husband requesting him to give them the name of the woman, but he refused to do so.

The petition was restored to the list, and the result of the application to the husband having been reported to Hill J. he decided to send the papers to the King's Proctor.

The King's Proctor applied to the husband for the necessary information, and received a letter from him in which he stated that he regretted that the Court would not grant "my decree nisi," but declined to disclose the name of the woman.

The petition eventually came before the President on November 5, 1930, Hill J. having in the meantime retired from the Bench.

Noel Middleton for the wife.
Hon. Victor Russell for the King's Proctor.

THE PRESIDENT (LORD MERRIVALE). This case caused my brother Hill J.—now my friend Sir Maurice Hill—a great deal of anxiety, and reading the evidence which was before him and which now, under order of the Court, is before me as the proof in this case, I understand well why it caused him anxiety.

A man and woman, two members of the Jewish body, had married in 1926. They were both of them young people. The man is now only twenty-five and the woman twenty-seven. They got on comfortably for a time, and then the husband and she, as she said, had "dreadful" differences—"many differences"—and led an unhappy life. He left her entirely

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in January, 1929, and in July, 1929, she received a letter from him in which he said this: "As we have both been separated from each other for some months now, I think it is only fair to both of us that I should give you grounds of divorce. I have therefore enclosed an hotel bill as evidence where misconduct took place. I trust that this will be sufficient, and thus release us both when each of us can find our own happiness." The letter did not give the name of any woman. That is a declaration on the part of the man who made it that he wants a divorce. The wife went to some solicitors, and they wrote to the husband, with the knowledge I am glad to say that solicitors now certainly have as to what the requirements not of the Court but of the law are in such cases, and said: "It does not prove what is necessary to be proved." The solicitors did not write at once. There was a petition filed before they wrote, and on the hearing the learned judge took the course I have indicated. He expressed his dissatisfaction. The solicitors wrote again and said so. They had applied for the name, and had not got it, but the respondent then wrote his second letter, which is produced: "It is with great regret that I hear that the judge declines to make my decree nisi for the dissolution of my marriage until he has ascertained the name and address of the woman." So that the respondent had become the petitioner. It is he who is seeking his decree nisi, which, according to English law, a guilty party may not do. "Once again I must state that I absolutely refuse to give the name and address of this woman, and I may add that this lady is a perfectly respectable and honourable lady, and most naturally I would not think of behaving in a most dishonourable way by disclosing her particulars." The case comes back to the list, and the learned judge finds himself strengthened in his disinclination to accept the proof thus tendered, such as it was, as conclusive proof, and he sends the papers to the King's Proctor. The King's Proctor makes inquiries, and the respondent maintains his attitude and says: "No, I shall say nothing about the person. I insist upon what I said in my letter."

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The case as it is presented is a case where there is complete formal evidence which could justify a finding of adultery, if the Court before which it was presented came to the conclusion that the evidence meant that adultery had been committed. That was the inquiry before the learned judge and that is the inquiry here now.

What is the state of the case? Here is an apparently respectable Jewish tradesman who has separated from his wife—left her, as she says—and then desires to have the marriage tie dissolved. In that state of the case he with the woman unknown, not described in any way, resorts to an hotel at Bognor, and there they spend two or three days together, occupying a bedroom. The chambermaid sees them in bed. These are the facts that are known as far as the evidence goes, apart from what the Court knows about the respondent and his account of the woman concerned. In that state of the case the King's Proctor, represented by Mr. Russell, says that he cannot add anything to the knowledge of the Court; he must leave the Court to deal with the problem as it stands. Mr. Middleton says that on facts such as these —a man and a woman unknown at a watering place together and occupying a bedroom together—unless there is an explanation, the man being a married man and the woman a woman other than his wife, it is in substance the duty of the Court to say that the Court must infer adultery. He says: "If you do not infer adultery, you find yourself in a quagmire of doubt as to what the truth of the matter is." I have always understood that if a judge, on a party raising an affirmative issue, finds himself in a quagmire of doubt as to the true conclusion upon the issue, his judgment must be against the party raising the affirmative issue. I do not think that is quite consistent with the argument which was presented to me, but I have understood that what I have stated is the law, and I believe still that it is so.

What is the state of the case here? It is that, so far as the evidence goes, there is no sort of indication that the respondent was likely to be guilty promiscuously of adultery. There is no evidence, although careful inquiry has been made

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by the King's Proctor, of any kind of any intimate association with a woman other than his wife—much less of illicit association—and the respondent represents the woman in question in terms which suggest, that whoever she may be, she is a woman of high and scrupulous character.

In that state of the case, ought the Court to come affirmatively to the conclusion, without any evidence of inclination on the part of the respondent either to be an adulterer generally, or to have an adulterous intimacy with some woman, that he has committed adultery because he comes and says (that is what it amounts to): "I went to Bognor with a woman. I shall not tell you who she was. We lived together at an hotel and the chambermaid saw us in bed"? It is quite true that if the respondent had shown an adulterous inclination generally, or an adulterous inclination with regard to one woman, or an intimate association with one woman and she had been identified or there was reason to believe she was the woman in question, what seems to me to be the missing link would be supplied. It is not supplied. It is said that the Court puts parties in great difficulty if it takes the course of not acting upon these suspicious proofs tendered by guilty parties who desire release from the marriage tie. How that may be I do not know. Certainly in 999 cases out of 1000, so far as my experience goes, when there has been adultery there is no question about it. It is plain enough. It is a grim and ugly fact. The learned counsel in an appeal, in which I sympathize with him, says: "At any rate, the petitioner now is seeking a divorce, and the Court ought to grant it." If a judge whose judgment is to be one of fact forgot his duty, he might find the fact contrary to the burden of proof. I do not think a judge will do that in this Division, or in the High Court, or, as far as I know, in any English Court. The learned counsel's argument rather pointed to the view that where one party to the marriage tenders grounds for supposing he has been unfaithful and the other party is willing to accept them, the Court should shut its eyes to the true view of the facts and under its statutory powers should say: "Very well; there

shall be a decree." At present that is not the law. A judge sitting here has not to make law or to amend it, or adapt it, or manœuvre against its proper effects. He is sitting here to administer the law, and, being asked to find upon these proofs tendered by or on behalf of the respondent that the wife is entitled to what he calls "my decree nisi," because he has committed adultery, I am bound to say I do not find proofs which establish that he has committed adultery.

Petition dismissed.

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The wife appealed. The appeal was heard on February 17, 1931.

Rayner Goddard K.C. and *Noel Middleton* for the appellant. There is no statutory ground for saying that the husband was bound to disclose the name of the woman with whom he alleged he had committed adultery, and the wife ought not therefore to be prejudiced by his refusal to disclose it. A wife is entitled to a decree nisi if the husband commits a single act of adultery, unless it is proved that she acted in collusion with him.

[LAWRENCE L.J. The only question is whether a jury on the evidence in this case would find that the husband had been guilty of adultery.]

By s. 198 of the Supreme Court of Judicature (Consolidation) Act, 1925: "The parties to any proceedings instituted in consequence of adultery and the husbands and wives of the parties shall be competent to give evidence in the proceedings, but no witness in any such proceedings, whether a party thereto or not, shall be liable to be asked or bound to answer any question tending to show that he or she has been guilty of adultery unless he or she has already given evidence in the same proceedings in disproof of the alleged adultery." The wife therefore could not have put the husband in the box and asked him the name of the woman, because he is protected by the section from answering the question.

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Allen v. *Allen* (1) shows what has always been the law. The President here has relied on matters the bearing of which on the case it is difficult to appreciate. He attaches, for example, a good deal of importance to the apparent absence of inclination to adultery on the part of the husband.

[LAWRENCE L.J. It is the fact of adultery which gives the wife the right to a decree.]

The President, also having regard to what the husband said in his letter about "my decree," has treated the matter as if it were really the husband's petition, and as if therefore all possible doubt must be thrown upon the evidence. In refusing to draw a very obvious inference, he indicated that because a guilty husband had shown a willingness to be divorced, that was a ground for saying that adultery had not taken place. It is submitted, however, that if a wife has acted bona fide and has proved her case by evidence which no reasonable person could doubt, she is entitled to a decree. The husband's state of mind is immaterial. The wife here, it is submitted, has clearly proved the adultery, and is therefore entitled to a decree.

[LORD HANWORTH M.R. referred to *Loveden* v. *Loveden*. (2)]

W. Latey (*Hon. Victor Russell* with him) for the King's Proctor stated that he had no instructions to argue the case on the merits.

LORD HANWORTH M.R. This Court fully recognizes the grave responsibility and serious difficulties which confront the judges of the Divorce Court in administering the law of divorce. Every effort must be made to prevent collusion, by which parties may wrongly obtain divorce by devices which prevent a true knowledge of the facts coming before the Court. I need hardly say that if we were merely dealing with a question of the discretion exercised by the President, who has an unrivalled experience in dealing with these cases, we should hesitate long before altering his decision. But this case does not depend solely on the exercise of discretion.

(1) [1894] P. 248. (2) (1810) 2 Hagg. Cons. 1, 2.

The President has added something to the law, and upon that the appeal comes before this Court.

Lilian Woolf presented her petition on August 9, 1929, charging her husband with adultery. The parties had been married in April, 1926, and had lived happily together for some years. At the end of 1928 differences described by the wife as "dreadful differences" had arisen between them, and the husband left his wife in January, 1929. In July, 1929, she received a letter from him, in which he said: "As we have both been separated from each other for some months now, I think it is only fair to both of us that I should give you grounds of divorce. I have therefore enclosed an hotel bill as evidence where misconduct took place. I trust that this will be sufficient, and thus release us both when each of us can find our own happiness." The President in his judgment makes the observation that the initiative for divorce arose from the husband; I doubt whether that is a fair inference to be drawn, since the husband refers in his letters to "our divorce," to the release of both parties, and says, "each of us can find our own happiness."

The petitioner immediately took action—and I think her good faith is shown by that. A petition was at once drawn up charging the husband with adultery, of which evidence was given by reference to the letter of July. The case came on before Hill J. on March 31, 1930. Evidence was given proving the entry in the hotel register, and by the chambermaid in the hotel, and by producing the receipted bill which had been enclosed in the husband's letter. The receipt showed that on Saturday, July 20, 1929, the husband and a lady arrived in a car; they had dinner, and the cost of that and the apartments is given. They stayed from Saturday night until Monday morning. The evidence of the chambermaid is that she saw them in the same bedroom in bed. Hill J. heard the evidence, and said that the wife was quite innocent; she had to prove adultery, and there was here hotel adultery. He meant, I think, that a visit to an hotel with a woman might in itself be insufficient, as that might be merely a device, and that such a visit without more

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would not necessarily carry the inference of adultery. He then adjourned the case to find out the name of the woman, I suppose because he wanted to carry the hotel evidence a little further. He did not wish to hear the witnesses again, but he desired to know the name of the woman.

Sub-s. 2 of s. 177 of the Supreme Court of Judicature (Consolidation) Act, 1925, says that: "On a petition for divorce presented by the wife the Court may, if it thinks fit, direct that the person with whom the husband is alleged to have committed adultery be made a respondent." In the case of a husband he must make the alleged adulterer a party unless excused by the Court, but in the case of a wife it is not essential that she should make the alleged adulteress a respondent. As Lawrence L.J. has pointed out, it is difficult to make a person a respondent unless the name is known or can be ascertained. The matter came before Hill J. ten days later, after an attempt had been made to obtain the name of the woman. The husband had replied to the wife's solicitors: "It is with great regret that I hear that the judge declines to make my decree nisi for the dissolution of my marriage until he has ascertained the name and address of the woman. Once again I must state that I absolutely refuse to give the name and address of this woman, and I may add that this lady is a perfectly respectable and honourable lady, and most naturally I would not think of behaving in a most dishonourable way by disclosing her particulars." Comment was made by Hill J. on the words "my decree nisi" in that letter. The letter is certainly not the letter of a cultured, well educated man; the grammar and form leave ground for criticism. The President, when the matter came before him, also took the words "my decree nisi" as indicating that the husband was the moving spirit, not the wife. In view of her promptness in presenting her petition, I cannot take that view. When Hill J. had considered the letter he said, addressing the petitioner's counsel: "You have done everything you could. . . . . I want to get the King's Proctor to help me. . . . . It is not your duty to put an inquiry officer to watch the

man. It does not rest with you, but the King's Proctor can help me by doing that. It may cost the man a very large sum of money before it is finished." He was satisfied of the bona fides of the petitioner, and he then sent the papers to the King's Proctor. Therefore this was a case in which the fact that the lady had been wronged was not questioned and she had taken all possible steps. The King's Proctor was unable to find out the name of the woman in question.

The case then came before the President, and he said of the petitioner: "The last thing I would wish to do would be to reflect on this lady in any way," and again: "I see no reason to assume that she did not act in good faith." But he said it was possible that those two people slept at the hotel not for the purpose of committing adultery, that the lady may have been a near relative. It seems to me, however, that the evidence having been given in good faith, it is the duty of the Court to act upon it, unless the King's Proctor can give some evidence to displace it. The President seems to have thought it was the duty of the petitioner to prove something more. He says: "It is quite true that if the respondent had shown an adulterous inclination generally, or an adulterous inclination with regard to one woman, or an intimate association with one woman, and she had been identified or there was reason to believe she was the woman in question, what seems to me to be the missing link would be supplied." That, I think, is a ruling of law not justified by the authorities. The petitioner is under no obligation to show adulterous inclination generally on the part of the respondent. In my opinion, if evidence is given in good faith which under all but the most unusual circumstances is clear evidence of adultery, it is the duty of the Court to act upon it, unless the King's Proctor can bring forward cogent evidence to rebut the obvious presumption.

In *Loveden* v. *Loveden* (1) Sir William Scott said that it was not necessary to prove the direct fact of adultery, for "if it were otherwise, there is not one case in a hundred in which that proof would be attainable: it is very rarely

(1) 2 Hagg. Cons. 1, 2.

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indeed that the parties are surprised in the direct fact of adultery. In every case almost the fact is inferred from circumstances that lead to it by fair inference as a necessary conclusion; and unless this were the case, and unless this were so held, no protection whatever could be given to marital rights." That passage has been quoted with approval in the Court of Appeal by Lopes L.J. in *Allen* v. *Allen* (1), where he says: "To lay down any general rule, to attempt to define what circumstances would be sufficient and what insufficient upon which to infer the fact of adultery, is impossible. Each case must depend on its own particular circumstances."

It seems to me that, human nature being what it is, adultery must be inferred here. The husband was twenty-five, and no more, and he had been married, and there is no reason to assume that his sexual appetite was less than that of a normal healthy man. I think that to say that an adulterous inclination should be proved is to lay an unjustifiable burden on the petitioner. The case is one of an innocent woman proving opportunity for adultery, and the fact that the parties spent two nights in the same bedroom. In my opinion in this case the Court ought to be satisfied that adultery has been proved.

Sub-s. 3 of s. 178 of the Supreme Court of Judicature (Consolidation) Act, 1925, provides: "If the Court is satisfied on the evidence that the case for the petition has been proved and does not find that the petitioner has in any manner been accessory to or connived at or condoned the adultery or that the petition is presented or prosecuted in collusion with either of the respondents, the Court shall pronounce a decree of divorce." In my opinion the Court ought to be satisfied with the evidence, and the words of that sub-section then come into operation. For these reasons I think that in accordance with the law there must be a decree nisi.

LAWRENCE L.J. In this case I find myself unable to agree with the judgment of the President.

(1) [1894] P. 248, 252.

It is clear from sub-s. 2 of s. 177 of the Supreme Court of Judicature (Consolidation) Act, 1925, that a wife can present a petition for divorce without making the woman with whom adultery is alleged to have taken place a respondent. It is desirable that the woman should be named where possible, and with the object of finding out who the woman was Hill J. directed further inquiries to be made by the wife's solicitors and the King's Proctor. These inquiries proved abortive, and the husband adhered to his resolve not to disclose the name of the woman. The evidence clearly negatived any connivance on the part of the wife, and the only question is what is the true inference to be drawn from the undisputed facts? In my opinion the only inference that can properly be drawn is that the husband committed adultery, and on this point I do not desire to add anything to what has been said by the Master of the Rolls. Both Hill J. and the President were naturally suspicious, because the husband was evidently anxious to obtain a divorce and took steps to induce the wife to commence divorce proceedings against him, but that fact does not prevent the wife from obtaining a divorce, if in fact the husband had committed adultery, provided that she had not connived. The motive which induced the husband to commit adultery cannot, in my judgment, deprive the wife of her right to obtain a divorce if he in fact did commit adultery.

I agree that the appeal should be allowed.

ROMER L.J. The learned President seems to have been greatly influenced by the fact that the husband in this case was himself very anxious that his wife should divorce him. It is perfectly plain that he was, but it is equally plain that, from the moment the wife heard from her husband his confession of adultery, she was very anxious to be divorced from him. She presented her petition accordingly. The petition complies with all the rules and orders of the Court, and the only question before the Court was whether she proved the act of adultery on the part of her husband that she alleged.

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Now, she had adduced all the evidence that was in her power. No one suggests that she was keeping anything back from the Court which she was in a position to place before it. The evidence that she adduced has been accepted as truthful evidence, and it is evidence from which the Courts until quite recently were always in the habit of presuming that adultery had taken place. Speaking for myself, I can see no reason whatsoever why at the present time that salutary rule should not still be followed.

It is said, and said truly, that the wife did not comply with the request that the name of the woman with whom the husband stayed at this hotel should be given. It was not given, because the husband refused to disclose it. What possible difference it would have made had the name been disclosed I am at a loss to see; because the only thing that the Court would have been able to discover from a disclosure of the name would have been that the lady was not, as the learned President suggests she might possibly have been, some near relative of the respondent. In my opinion, that possibility can be entirely ruled out; it is incredible, in the circumstances, that the lady was an aunt or a sister or any like near relation of the respondent. If that possibility is ruled out, then the disclosure of the name of the lady could not have helped unless the petitioner was in a position to demand from her positive evidence whether adultery had or had not been committed. But that was not evidence which the petitioner or the Court could insist upon the lady giving even if her name had been disclosed.

For these reasons I agree that this appeal should be allowed.

After consultation with counsel, the Court ordered that, in view of the delay which had taken place, the decree should be made absolute in fourteen days.

Appeal allowed and decree nisi granted.

Solicitors: *Gisborne & Co.; King's Proctor.*

W. I. C

RUGG-GUNN *v.* RUGG-GUNN AND ARCHER.

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March 10, 25.
C. A.
April 14.

Divorce—Practice—Trial—Right of Party to insist on Trial by Jury—Several Issues—Cruelty—Discretion of Court—Matrimonial Causes Act, 1857 (20 & 21 *Vict. c.* 85), *s.* 28—*Matrimonial Causes Rules*, 1924, *r.* 97—*Supreme Court of Judicature (Consolidation) Act*, 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 99, *sub-s.* 1 (*h*); *ss.* 103, 177, 226.

There is now no statutory right of a party to a matrimonial suit to insist on the trial of any issue of fact by a jury.

On a petition by a husband seeking dissolution of marriage on the ground of the alleged adultery of the respondent wife with the co-respondent the respondent counter-charged the petitioner with cruelty and prayed a judicial separation. An order having been made for the trial by a jury of the issue of adultery the Court of Appeal (affirming the decision of Langton J.) refused to extend the order to include the issue of cruelty.

ADJOURNED SUMMONS.

The petition was filed by the husband, who made divers charges of adultery against the wife and co-respondent. The co-respondent traversed the charge, the wife also traversed it, and further counter-charged the husband with cruelty and prayed a judicial separation. By his reply the husband traversed the charge against him. On November 6, 1930, a Registrar ordered trial of the cause by a special jury at the instance of the respondent wife. On settling the questions for the jury the Registrar refused to include a question whether the petitioner had been guilty of cruelty to the respondent. The respondent then took out the present (judge's) summons asking that the issue of cruelty be left to the jury. The summons came on before Langton J. in chambers on February 10, 1931, and was adjourned into Court for argument.

Willis K.C. (*G. C. Tyndale* with him) for the respondent.

Roland Oliver K.C. (*T. Bucknill* with him) for the petitioner.

The arguments turned on the effect of the following practice sections in Statutes and the Rules of Court for the trial of matrimonial or other causes from 1857 onwards: Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), ss. 27, 28, 53; Rules and Regulations, December 26, 1865, taking effect on and after January 11, 1866, rr. 40, 41, 42, 43; Additional and Amended

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Rules, July, 1880, r. 205; Juries Act, 1918 (8 & 9 Geo. 5, c. 23), s. 1 (*d*); Administration of Justice Act, 1920 (10 & 11 Geo. 5, c. 81), s. 2, sub-s. 1 (*b*); Matrimonial Causes Rules, 1924, February 14, 1924, taking effect on and after March 1, 1924, rr. 30 (A), (B), 97; Administration of Justice Act, 1925 (15 & 16 Geo. 5, c. 28), s. 3; Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49), s. 99, sub-s. 1 (*h*), ss. 103, 177, 226, Sch. VI. (repealing Matrimonial Causes Act, 1857, ss. 22 to 31, and Administration of Justice Act, 1925, ss. 1 to 18); R. S. C., Order XXXVI., rr. 2, 3, 4, 5, 6; Order LXVIII., r. 1.

The contentions of both sides are fully dealt with in the judgment of Langton J., as also the practice sections and rules which for more convenient reference are set out at the end of this report.

March 25. LANGTON J. This is a matter raised by way of summons, which I adjourned into Court for argument. It raises a question of some general importance—namely, whether a party to divorce proceedings has a right to insist upon trial by jury of an issue of cruelty.

The case comes before me at the instance of the respondent to a divorce suit who is desirous that the following question should be left to the jury, "Whether the petitioner A. R.-G. has treated the respondent G. M. R.-G. with cruelty." The petitioner in the suit is a husband alleging adultery. The respondent by her answer denies adultery and alleges cruelty on the part of the petitioner and prays for a judicial separation from the petitioner.

It is worthy of note in passing that the cruelty in this instance does not form any part of the basis of a claim for divorce.

On November 6, 1930, upon the application of the respondent an order was made that the case be heard by a judge and special jury. On a later date the questions which the respondent desired to be submitted to the jury were carried in before a Registrar. The first two of these questions concerned adultery between the respondent and co-respondent,

and both of them were sanctioned by the Registrar. As to the third question, which is before me, the Registrar ruled that leave must be obtained from the judge by order on summons to allow the question to be submitted to the jury.

Against this refusal of the Registrar, counsel, on behalf of the respondent, argued: First, as a matter of law, that the respondent had a right to insist upon this question being tried by a jury; secondly, as a matter of discretion, that the Registrar was wrong in deciding that the question be not submitted to the jury; and thirdly, that as a matter of discretion I ought to allow this question in this case to be put before the jury.

Obviously, the first of these points only is of any general importance. It was elaborately argued before me, and in order that the arguments may be appreciated it will be convenient in the first place to review the history of the subject. In the year 1857 a Matrimonial Causes Act was passed, of which s. 28 is as follows: "Upon any such petition presented by a husband the petitioner shall make the alleged adulterer a co-respondent to the said petition, unless on special grounds, to be allowed by the Court, he shall be excused from so doing; and on every petition presented by a wife for dissolution of marriage the Court, if it sees fit, may direct that the person with whom the husband is alleged to have committed adultery be made a respondent; and the parties or either of them may insist on having the contested matters of fact tried by a jury as hereinafter mentioned."

The opening words of this section, "Upon any such petition" seem to refer to the petitions described and permitted by the immediately preceding section, s. 27.

Again it is to be noted that the petitions referred to in ss. 27 and 28 are petitions for dissolution of marriage, i.e., divorce, and that the right granted to the parties by the final words of s. 28 is apparently limited to contested matters of fact arising in or upon such petitions. There is no general right given to insist upon trial by jury of any contested matter of fact in other proceedings which may fall to be heard by the Court. Sect. 53 of the same Act of 1857 gave the Court

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power to make rules and regulations concerning the practice and procedure under the Act. The earliest rules which were brought to my notice as having been made under this Act were a body of rules entitled "Divorce Rules," of which Nos. 1 to 174 came into force on January 11, 1866.

Of these the rules material to the question in hand appear to be rr. 40 to 43 inclusive. The rules make no specific reference to the right of the parties to insist on having contested matters of fact tried by a jury as reserved by s. 28 of the Act of 1857. They provide on the other hand a short code of procedure as to mode of trial and the mode in which questions of fact for the jury should be settled. In the year 1880 further rules—namely, Nos. 205 to 211—were added to the original regulations, which altered to some extent the procedure for determining the mode of trial. Of these the rule most material to the present case is r. 205, which is as follows: "It shall not be necessary in any case to apply to the Court by motion for directions as to the mode of hearing or trial of a cause. When the pleadings are concluded, the parties to a cause may proceed in all respects as though upon the day of filing the last pleading a special direction had been given by the Court as to the mode of hearing or trial to the effect following: 1st. In cases in which damages are not claimed that the cause be heard by oral evidence before the Court itself, without a jury. 2nd. In cases in which damages are claimed that the cause be tried before the Court with a common jury. And any party to a cause may apply by summons for a direction that the cause may be heard or tried otherwise than is hereby provided."

In the year 1918 the Juries Act of that year put certain limitations upon the right to a jury in special cases. This Act was of course a war measure and the limitations thus imposed were not intended to be permanent. Moreover, s. 1 of this Act expressly preserved the right of any party under s. 28 of the Matrimonial Causes Act, 1857, to insist on having contested matters of fact tried by jury. In 1920 the Administration of Justice Act of that year restored to a considerable extent the right of trial by jury which

had been limited by the Act of 1918. Again, however, the right of a party under s. 28 of the Matrimonial Causes Act, 1857, was by s. 2, sub-s. 1 (*b*), expressly and in terms preserved. On March 1, 1924, a body of rules, known as the Matrimonial Causes Rules, 1924, came into force. These rules were dated February 14, 1924, and are expressed as being made under the provisions of the Matrimonial Causes Acts, 1857 and 1907. In so far as these refer to questions of trial or hearing, the relevant rules appear to be rr. 30 to 34, both inclusive. In particular it may be noted r. 30 (B) is in the following terms: "Unless a Registrar shall otherwise order on summons, all causes in which damages are claimed shall be tried by a common jury and all other causes shall be heard by the Court itself without a jury." In 1925, two statutes of far reaching importance as regards the administration of justice were put on the Statute book. The first of these was the Administration of Justice Act, 1925, and the second was the Supreme Court of Judicature (Consolidation) Act, 1925. Sect. 3 of the Administration of Justice Act, 1925, provides as follows: "Section 2 of the Administration of Justice Act, 1920 (which relates to the mode of trial in the High Court) shall cease to have effect, and provision may be made by Rules of Court in the same manner as if the Juries Act, 1918, and section 2 of the Administration of Justice Act, 1920, had not passed, for prescribing in what cases trials in the High Court are to be with a jury and in what case they are to be without a jury, and until such rules come into force the Rules of Court relating to the mode of trial in the High Court, which were in force immediately before the passing of the Juries Act, 1918, shall have effect."

Much argument was addressed to me in this case upon the effect of this section of the prevailing Divorce Rules, but for reasons which I shall state hereafter I am of opinion that this section in no way touched or disturbed the then prevailing Matrimonial Causes Rules, 1924. Finally the Supreme Court of Judicature (Consolidation) Act of 1925 laid down by s. 99 the purposes for which Rules of Court could

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be made, and by s. 103 made a wide saving for former procedure. Having thus dealt comprehensively with the past and the future this Act proceeded by s. 226 to repeal the enactments set out in Sch. VI. of the Act. This Schedule contains (inter alia) the Matrimonial Causes Act, 1857, ss. 22 to 31, and the Administration of Justice Act, 1925, ss. 1 to 18. From these repeals it will be apparent that s. 28 of the Matrimonial Causes Act, 1857, is no longer in existence, and that s. 3 of the Administration of Justice Act, 1925, perished after a statutory life of only three months. Whether by rule or statute, complaint cannot be made that there is here any lack of ordinance. The difficulty, if any there be, is in threading one's path amid this luxuriant growth. The conclusion at which I have arrived with the assistance of counsel is that since the repeals effected by the Supreme Court of Judicature (Consolidation) Act of 1925, the only statutory provision by which parties had any right to insist upon contested matters of fact in divorce petitions being tried by a jury—namely, s. 28 of the Matrimonial Causes Act, 1857—has been swept away, and that there is now, as a matter of law, no such right existing. Furthermore, the Matrimonial Causes Rules of 1924 are to my mind the rules which are at present in force governing the mode of trial in this Division, and these certainly point to no reservation or preservation of the right to insist upon a trial by jury.

I now turn to the arguments which were addressed to me on behalf of the parties and the reasons which have guided me to a conclusion.

Counsel for the respondent did not declare himself in favour of any set of rules as comprising the code at present in force. He preferred to argue the matter from a number of standpoints, and claimed that upon any possible view he was entitled to insist now upon trial by jury of the question of cruelty raised by the respondent. He did not contend that the Matrimonial Causes Rules of 1924 were not now in force, but he claimed that r. 30 (B) of these rules had been killed by s. 3 of the Administration of Justice Act, 1925. He was undismayed by the fact that that short lived enactment had

itself perished after a life of only three months. His contention was that, since the Rules of Court relating to the mode of trial in the High Court, which were in force immediately before the passing of the Juries Act, 1918, were by s. 3 of the Administration of Justice Act, 1925, restored to life, the Matrimonial Causes Rules of 1924 were, in so far as they were in conflict with the earlier rules, thereby abolished, and could not be revived by the repeal of s. 3 of the Administration of Justice Act, 1925. Rule 30 (B) of the Matrimonial Causes Rules, 1924, was according to his argument in conflict with the earlier rules of 1865 and 1880, and must therefore be treated as no longer in force to-day. Counsel for the petitioner characterized this argument as a feat of considerable mental agility, and gave, as I shall notice presently, a sufficient reason for its rejection. In addition, however, I would point out, that r. 30 (B) does not appear to me to be seriously in conflict or even at variance with r. 205 of the earlier rules. Alternatively, upon this aspect of the matter counsel for the respondent argued that if r. 30 (B) stands to-day it is in any case a rule which affects procedure only and any rights which the parties may have by statute are untouched by the rule. With this argument I have much more sympathy than with the first point, but he did not explain to me under what statute he now claimed to have a right, since his original basis of claim—namely, s. 28 of the Matrimonial Causes Act, 1857—has been clearly swept away by the Supreme Court of Judicature (Consolidation) Act of 1925.

The next viewpoint which counsel for the respondent invited me to adopt was to regard the subject from the angle of the Rules of the Supreme Court. As authority for the adoption of this standpoint, he cited the case of *Giles* v. *Giles*. (1) In that case Lord Gorell (then Gorell Barnes J.) said: "The Divorce Court Rules are not exhaustive," and proceeded to apply the Rules of the Supreme Court to make provision for a guardian for a respondent of unsound mind. He also reminded me of r. 97 of the Matrimonial Causes Rules,

(1) [1900] P. 17, 18.

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1924, by which the Rules of the Supreme Court are to be deemed to apply to any matter of practice or procedure which is not governed by statute or dealt with by the Matrimonial Causes Rules. He referred me to Order XXXVI., rr. 2 to 6, of the Rules of the Supreme Court, and contended that since the matter in question did not fall within the earlier rules of the Order, he was entitled under r. 6 to claim a trial by jury of the issue here raised. If this Order applies to the matter in question the contention here put forward for the respondent is certainly of weight, but my attention was directed on behalf of the petitioner to Order LXVIII., r. 1. The wording of this rule seems to make it abundantly clear that Order XXXVI. does not apply to proceedings for divorce or other matrimonial causes. In a note to Order LXVIII., r. 1, in the Annual Practice, 1931 (p. 1498), under the heading, "Proceedings for Divorce," it is definitely stated that the rules now in force in the Divorce Division are the Supreme Court Matrimonial Causes Rules dated February 14, 1924 (as amended by Order dated November 21, 1924). Furthermore, in a note to r. 2 of Order XXXVI. under the heading "Divorce" (p. 605), the Annual Practice states as follows: "These rules (meaning the rules as to mode of trial under Order XXXVI.) do not apply to divorce." The note, however, then proceeds to deal with s. 28 of the Matrimonial Causes Act, 1857, and concludes with the following statement: "The above section is repealed by the Judicature Act, 1925, but its effect is preserved by section 99 (1.) (*h*)." This sub-section of the Supreme Court of Judicature (Consolidation) Act, 1925, provides as follows: "(1.) Rules of Court may be made under this Act for the following purposes . . . . (*h*) For prescribing in what cases trials in the High Court are to be with a jury and in what cases they are to be without a jury."

By what method or by what process of reasoning, this very clear and simple sub-section could preserve the effect of s. 28 of the Act of 1857 I am unable to guess, and none of the learned counsel before me were more fertile in speculation. So far as I can see this single concluding sentence of the note

on p. 605 of the Annual Practice stands as the only authority for the proposition that any life or virtue still remains in the repealed s. 28. I share to the full the admiration and respect in which this monumental volume is generally held, but I cannot accept this unsupported statement against what seems to be the plain result of legislative enactment. It is a consolation to me to reflect that if my judgment in this matter be right, subsequent editions of the Annual Practice need suffer only by excision, and the book will to that extent obtain relief from the tendency to adiposity which constitutes the only blemish upon its perfection.

The argument which was presented on behalf of the petitioner took a more direct course than that on the other side. It was claimed unequivocally that the rules in force to-day governing the question of trial by jury in the Divorce Division are the Matrimonial Causes Rules, 1924, and no others. Whilst agreeing that r. 97 of these rules enables the Rules of the Supreme Court to be applied in matters which are not governed by statute, or by the Matrimonial Causes Rules themselves, counsel for the petitioner contended that rr. 30 to 34 provide a full and sufficient code to deal with the matter in hand. So far as the Rules of the Supreme Court are concerned he pointed to the plain terms of Order LXVIII., r. 1, and reinforced the argument by the incontestable fact that the Rules Committee are to-day continuing to treat the Matrimonial Causes Rules, 1924, as the rules now in force governing divorce matters. The force of this contention is strengthened in my mind by the fact that I have received as late as February of this year an amendment to these rules whereby a new r. 34A was added to the existing rules under the authority of the rules committee.

Turning to the argument for the respondent that r. 30 (B) of the Matrimonial Causes Rules had been killed by the operation of s. 3 of the Administration of Justice Act, 1925, counsel for the petitioner pointed out that s. 3 dealt in the first place with two Acts of Parliament—namely, the Juries Act, 1918, and the Administration of Justice Act, 1920, each of which had been careful to provide that the right of any

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party under s. 28 of the Matrimonial Causes Act, 1857, should be in no wise affected by the respective statutes.

Since s. 28 of the Act of 1857 had thus been expressly saved it could not be said that the section which abolished the relevant sections of the Juries Act, 1918, and Administration of Justice Act, 1920, could have any effect upon or reference to s. 28 of the Act of 1857 or any rules made thereunder. The second part of s. 3 of the Administration of Justice Act, 1925, which provided for the making of new rules, and gave power until such rules were made to any rules existing prior to the Juries Act, 1918, has to be read with the earlier part of the section. As counsel for the petitioner contended, and, as I think, it is a straining of language beyond all natural and ordinary meaning to suppose that the section meant to strike at rules which have come into force without the slightest reference to the Juries Act, 1918, or s. 2 of the Administration of Justice Act, 1920, which the section was concerned to repeal. It requires an even greater feat of mental agility to imagine that this section, whilst keeping the remainder of the Matrimonial Causes Rules, 1924, in operation, should have aimed a selective thunderbolt at r. 30 (B) and left the Divorce Rules truncated in this important particular. Counsel for the petitioner also dealt with the original position under the Matrimonial Causes Act, 1857, and claimed that upon a fair reading of ss. 27 and 28, the respondent in this case would not have had, even if these sections had been left standing, any right to insist upon a jury for the issue of cruelty. His argument was that the right to insist upon a jury granted by s. 28 is limited to contested matters of fact arising upon divorce petitions. The issue of cruelty in this case does not arise upon a petition for divorce since it is no answer to the matter upon which a claim for divorce rests. It is in truth only a matter upon which the cross-prayer for judicial separation is based. I am inclined to think that this somewhat technical point is a good one ; but I prefer to base my judgment upon the broader ground that s. 28 was the only statutory enactment which gave " a right to insist," and s. 28 is gone. Some

further light is thrown upon the matter by counsel by means of a comparison between s. 177 of the Supreme Court of Judicature (Consolidation) Act, 1925, and s. 28 of the Act of 1857. It is to my mind a very arresting fact that s. 177 of the Act of 1925 re-enacts everything in the repealed section, except the final words upon which the whole claim of a right to insist upon a jury rests. There is obviously here no case of an omission on the part of the Legislature per incuriam. It seems clear that the final words of s. 28 were deliberately and intentionally omitted in the Act of 1925.

There remains the question of discretion. The first point made on this matter I think ignored the departmental direction by which the Registrars of this Division are enjoined to reserve all question arising upon issues of cruelty for determination by the judge. In this case the Registrar therefore could not act otherwise than he did. He merely obeyed his instructions. As to another argument indicated rather than insisted upon—namely, that the Court has no power to limit the questions once a jury has been granted, it is probably sufficient to point to the course of procedure indicated by the Rules of to-day and followed according to common knowledge from 1857 to the present. No authority in support of this somewhat astonishing proposition was cited. Having arrived thus far it becomes necessary to deal with the matter in hand upon the footing that it lies within the discretion of the Court for decision. In this particular case the charges of cruelty are some seventeen in number. They vary in gravity and genus between, on the one hand, a charge of throwing money at the respondent, and at the other end of the chain, a criminal charge of abortion. In my judgment a question which comprises such a multiplicity and variety of charges will tax to the full the energies of any judge who has the misfortune to try it. I think it would almost certainly overtax the capacity of a jury. I purposely refrain from saying anything of a general nature as to whether charges of cruelty should or should not be tried by a jury. I think it is peculiarly a matter in which each case should be considered on its merits. In this case I am clearly of opinion that the matter ought

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not to be tried by a jury, and I exercise my discretion accordingly.

Wife's costs.

Leave to appeal.

R. M. M.

The wife appealed. The appeal was heard on April 14, 1931.

Willis K.C., *G. C. Tyndale* and *Herbert Rolfe* for the wife repeated the arguments used by them in the Court below.

Roland Oliver K.C., *T. Bucknill* and *R. T. Barnard* for the husband were not called upon to argue.

LORD HANWORTH M.R. This is an appeal from the decision of Langton J., who declined to make an order for the trial of an issue of cruelty by a jury. The facts are these. The petition is by the husband charging adultery against the wife. The wife has put in an answer denying the adultery and has made counter-charges of cruelty against the husband. The items of cruelty are as many as seventeen and vary in gravity. [His Lordship referred to the various charges which included keeping her short of money, continuous insults, etc.] The purpose of these charges of cruelty is to prevent the husband getting relief in the event of his proving that she has committed adultery.

The questions to be put before the jury which were submitted to the Registrar were: (1.) whether adultery had been committed by the wife; (2.) whether adultery had been committed by the husband; and (3.) whether the husband had been guilty of cruelty. An order had been made by the Registrar generally that there should be a jury. But when the question of cruelty was submitted to him he refused to order that it should be tried by a jury and told the parties that they must go to the judge to get his decision on that point. Langton J. has confirmed that refusal of the Registrar to include the issue of cruelty holding that the issue was not one to be presented for trial by a jury and it is from that judgment that the present appeal is brought.

Mr. Willis based his argument on the provision in s. 28 of the Matrimonial Causes Act of 1857 that in the case of a petition charging adultery "the parties or either of them may insist on having contested matters of fact tried by a jury." My own view is that those words were confined to matters of fact connected with the main charge of adultery, and did not extend to counter-charges brought by either party. But that point has not been fully argued, and I am prepared to allow that if s. 28 were still operative it would give a right to insist on a jury in a case of counter-charges of cruelty.

But before considering s. 28 I must call attention to the fact that there are different degrees of cruelty. In *Russell* v. *Russell* (1) in the House of Lords Lord Herschell said: "It was conceded by the learned counsel for the appellant, and is, indeed, beyond controversy, that it is not every act of cruelty, in the ordinary and popular sense of that word, which amounted to sævitia, entitling the party aggrieved to a divorce; that there might be many wilful and unjustifiable acts, inflicting pain and misery, in respect of which that relief could not be obtained. When once this is conceded, it obviously becomes necessary to ascertain what was meant by sævitia, or cruelty, in the Ecclesiastical Courts, when regarded as a ground for divorce." Lord Shand says (2): "It appears to me that the result of the authorities, so fully considered in the opinion which has been delivered by my noble and learned friend Lord Herschell, is that the rule or principle for which the respondent contends, and to which effect has been given in the judgment of the Court of Appeal, is that on which the Ecclesiastical Courts acted previous to the statute, and is now the law; and that, however truly it may be said that the respondent has been guilty of cruelty in a popular or wide sense of the term, it has not been shewn that there has been cruelty in the sense which the law requires as a ground of divorce or separation." These passages make clear the distinction between cruelty as popularly understood and cruelty in law. There are here a number of charges of cruelty of different degrees, and a judge

(1) [1897] A. C. 395, 445. (2) [1897] A. C. 462.

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might well desire to retain control of those issues in his hands, and not to leave them to the less instructed minds of a jury. Therefore on principle, and in the exercise of his discretion, I think that the judge had a right to differentiate between the questions of adultery and cruelty and to keep the issue as to cruelty for the decision of the Court.

Turning now to the statutes, s. 28 has not been lost sight of in two subsequent Acts. The Juries Act, 1918, s. 1 (*d*), expressly provided that nothing should affect the right of any party under s. 28 of the Act of 1857 to have a jury. Equally in the Administration of Justice Act, 1920, s. 2, sub-s. 1 (*b*), provision is made for the saving of the right. By s. 3 of the Administration of Justice Act, 1925, which was only in operation for a short time, it was provided that "section 2 of the Administration of Justice Act, 1920 (which relates to the mode of trial in the High Court), shall cease to have effect, and provision may be made by rules of court in the same manner as if the Juries Act, 1918, and section 2 of the Administration of Justice Act, 1920, had not passed, for prescribing in what cases trials in the High Court are to be with a jury and in what cases they are to be without a jury, and until such rules of court come into force the rules of court relating to the mode of trial in the High Court, which were in force immediately before the passing of the Juries Act, 1918, shall have effect." That left the matter to be dealt with by rules, rather than by statute.

Whether that was so or not, the matter does not rest there, because the Supreme Court of Judicature (Consolidation) Act of 1925 repealed the Act of 1857 and the Administration of Justice Act, 1925, which had already repealed the Act of 1920. The operation of the Juries Act, 1918, which was passed as a temporary measure had expired. The result is that after the Consolidation Act of 1925 came into force it was no longer possible to rely on s. 28 of the Act of 1857; that has gone and has been replaced by the Consolidated Act of 1925. When, however, one turns to see how s. 28 has been dealt with, it is significant to note that s. 177 of the Act of 1925 reproduces s. 28 in part; it reproduces almost verbatim

the earlier words, but it omits the latter part as to the right to demand a jury.

Mr. Willis says that the Act of 1925 is a consolidating and not an amending Act, and that the then existing rules of practice must be read into it; but the Court must take the Act as it finds it, and we find that the provision giving a right to insist on a trial by jury no longer exists as the law of the land. Sect. 103, sub-s. 1, of the Consolidation Act, 1925, confirms that view, for it says, "Save as is otherwise provided by this Act or by rules of court, all forms and methods of procedure which, under or by virtue of any law, custom, general order or rules whatsoever, were formerly in force in any of the courts the jurisdiction of which is vested in the High Court or the Court of Appeal respectively, and which are not inconsistent with this Act or with rules of court, may continue to be used in the High Court and the Court of Appeal respectively in the like cases and for the like purposes as those in and for which they have been applicable in the former respective courts." In other words, the Act of 1925 seems to treat the question of a right to a jury as a question no longer of a right, but a question of rule. Rule 30 (B) of the Matrimonial Causes Rules, 1924, says: "Unless a Registrar shall otherwise order on summons, all causes in which damages are claimed shall be tried by a common jury and all other causes shall be heard by the Court itself without a jury." Langton J. has traced the rules in point, and we agree with him that, putting it shortly, s. 28 is no longer law. Therefore the right to insist on a jury is no longer existent, and if a jury is granted it is under the powers given to the Court by the Rules which at the same time do not circumscribe the power of the Court to say that a case shall be tried by a judge alone.

The Matrimonial Causes Rules, 1924, in rr. 30 to 34, which deal with trial or hearing, contain no provisions giving a right to either party to demand a jury.

The appeal therefore fails and must be dismissed with costs.

LAWRENCE L.J. I agree. On the first and more important point raised by Mr. Willis that there is a right to have the

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case tried by a jury I find myself in complete agreement with Langton J. Sect. 28 of the Act of 1857 has been repealed and the procedure is now governed by the Matrimonial Causes Rules, 1924. So far as rr. 30 to 34 do not cover the whole ground r. 97 provides that: "In any matter of practice or procedure which is not governed by statute or dealt with by these Rules, the Rules of the Supreme Court in respect of like matters shall be deemed to apply." Therefore the Rules of 1924 form a complete code which now regulates the procedure in the Divorce Division.

As regards the question whether Langton J. was right in the exercise of his discretion in refusing to allow the issue of cruelty to be tried by a jury I am of opinion that in the circumstances of this case his discretion was rightly exercised.

As in my opinion the question does not arise, I prefer not to express any opinion on the point taken before us that under s. 28 of the Act of 1857 the right to demand a jury was confined to contested matters of fact connected with the main charge of adultery and did not extend to counter-charges of cruelty such as have been put forward by the wife in the present case.

In my opinion the appeal should be dismissed.

ROMER L.J. I agree. It seems clear from recent legislation that the provision of s. 28 of the Act of 1857 giving a right to the parties to demand a jury has been swept away. Mr. Willis therefore can only appeal from the exercise by the learned judge of his discretion. On that point I have nothing to add to what has been already said. I think that without doubt the discretion of the learned judge was properly exercised by him in the circumstances of this case.

Appeal dismissed.

Solicitors for petitioner: *Morgan, Price, Marley & Rugg.*
Solicitors for respondent: *Wingfields, Halse & Trustram.*

W. I. C

NOTE.

The MATRIMONIAL CAUSES ACT, 1857 (20 & 21 Vict. c. 85), s. 27 (deals with the grounds upon which a petition for dissolution of marriage may be presented).

Sect. 28: Upon any such petition presented by a husband the petitioner shall make the alleged adulterer a co-respondent to the said petition, unless on special grounds, to be allowed by the Court, he shall be excused from so doing; and on every petition presented by a wife for dissolution of marriage the Court, if it see fit, may direct that the person with whom the husband is alleged to have committed adultery be made a respondent; and the parties or either of them may insist on having the contested matters of fact tried by a jury as hereinafter mentioned.

Sect. 53: The Court shall make such rules and regulations concerning the practice and procedure under this Act as it may from time to time consider expedient, and shall have full power from time to time to revoke or alter the same.

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Rule 40: When the pleadings on being concluded have raised any questions of fact, the petitioner, within fourteen days from the filing of the last pleading, or at the expiration of that time, on the next day appointed for hearing motions in the Court, or in case the petitioner should fail to do so at such time, either of the respondents on whose behalf such questions have been raised, may apply to the Judge Ordinary by motion to direct the truth of such questions of fact to be tried by a special or common jury.

Rule 41: Whenever the Judge Ordinary directs the issues of fact in a cause to be tried by a jury, the questions of fact raised by the pleadings are to be briefly stated in writing by the petitioner and settled by one of the Registrars.

Rule 42: Should the petitioner fail to prepare and deposit the questions for settlement in the Registry within fourteen days after the Judge Ordinary has directed the mode of trial, either of the respondents on whose behalf such questions have been raised shall be at liberty to do so.

Rule 43: After the questions have been settled by the Registrar, the party who has deposited the same shall deliver a copy thereof as settled to each of the other parties to be heard on the trial of the cause, and either of such parties shall be at liberty to apply to the Judge Ordinary by summons within eight days, or at the expiration of the time on the next day appointed for hearing summonses in this Court, to alter or amend the same, and his decision shall be final.

ADDITIONAL AND AMENDED RULES, 1880.

Rule 205: It shall not be necessary in any case to apply to the Court by motion for directions as to the mode of hearing or trial of a cause. When the pleadings are concluded, the parties to a cause may proceed in all respects as though upon the day of filing the last pleading a special direction had been given by the Court as to the mode of hearing or trial to the effect following:—

1st. In cases in which damages are not claimed that the cause be heard by oral evidence before the Court itself, without a jury.

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2nd. In cases in which damages are claimed that the cause be tried before the Court with a common jury.

And any party to a cause may apply by summons for a direction that the cause may be heard or tried otherwise than is hereby provided.

JURIES ACT, 1918 (8 & 9 Geo. 5, c. 23).

Sect. 1: Subject to the provisions of this Act every action, counterclaim, issue, cause, or matter, in the High Court in England requiring to be tried shall be tried by a judge alone without a jury: Provided that—

(*d*) nothing in this section shall affect the right of any party under section 28 of the Matrimonial Causes Act, 1857, to insist on having contested matters of fact tried with a jury. . . . .

ADMINISTRATION OF JUSTICE ACT, 1920 (10 & 11 Geo. 5, c. 81).

Sect. 2, sub. s. 1: Where, in any action or other matter whatsoever requiring to be tried in the High Court, the Court or judge is satisfied, on an application made by either party to the proceedings in accordance with Rules of Court, that the action or matter cannot as conveniently be tried with a jury as without a jury, the Court or a judge shall, subject to the provisions of this section, have a power, notwithstanding anything in any Act, to order the action or matter to be tried without a jury: Provided that . . . .

(*b*) Nothing in this section shall affect the right of any party under s. 28 of the Matrimonial Causes Act, 1857, to insist on having contested matters of fact tried with a jury . . . .

MATRIMONIAL CAUSES RULES, 1924.

Rule 30 (A): Before a cause is set down for trial or hearing, the pleadings and proceedings in the cause shall be referred by the petitioner or any party who is defending the suit to one of the registrars who shall certify that the same are correct and in order and the registrar to whom the same are referred shall cause any irregularity in such pleadings or proceedings to be corrected or refer any question arising thereon to the Judge for his direction.

(B) Unless a registrar shall otherwise order on summons, all causes in which damages are claimed shall be tried by a common jury and all other causes shall be heard by the Court itself without a jury.

Rule 97. In any matter of practice or procedure which is not governed by statute or dealt with by these Rules, the Rules of the Supreme Court in respect of like matters shall be deemed to apply.

ADMINISTRATION OF JUSTICE ACT, 1925 (15 & 16 Geo. 5, c. 28).

Sect. 3: Section two of the Administration of Justice Act, 1920 (which relates to the mode of trial in the High Court), shall cease to have effect, and provision may be made by rules of court in the same manner as if the Juries Act, 1918, and section two of the Administration of Justice Act, 1920, had not passed, for prescribing in what cases trials in the High Court are to be with a jury and in what cases they are to be without a jury, and until such rules of court come into force the rules of court relating to the mode of trial in the High Court, which were in force immediately before the passing of the Juries Act, 1918, shall have effect.

SUPREME COURT OF JUDICATURE (CONSOLIDATION) ACT, 1925.

(15 & 16 Geo. 5, c. 49).

Sect. 32: The jurisdiction vested in the High Court and the Court of Appeal respectively shall, so far as regards procedure and practice, be exercised in the manner provided by this Act or by rules of court, and where no special provision is contained in this Act or in rules of court with reference thereto, any such jurisdiction shall be exercised as nearly as may be in the same manner as that in which it might have been exercised by the court to which it formerly appertained.

Sect. 99, sub-s. 1: Rules of court may be made under this Act for the following purposes . . . .

(*h*) For prescribing in what cases trials in the High Court are to be with a jury and in what cases they are to be without a jury.

Sect. 103, sub-s. 1: Save as is otherwise provided by this Act or by rules of court, all forms and methods of procedure which, under or by virtue of any law, custom, general order or rules whatsoever, were formerly in force in any of the courts the jurisdiction of which is vested in the High Court or the Court of Appeal respectively, and which are not inconsistent with this Act or with rules of court, may continue to be used in the High Court and the Court of Appeal respectively in the like cases and for the like purposes as those in and for which they would have been applicable in the former respective courts.

Sect. 177, sub-s. 1: On a petition for divorce presented by the husband or in the answer of a husband praying for divorce the petitioner or respondent, as the case may be, shall make the alleged adulterer a co-respondent unless he is excused by the court on special grounds from so doing.

Sub-s. 2: On a petition for divorce presented by the wife the court may, if it thinks fit, direct that the person with whom the husband is alleged to have committed adultery be made a respondent.

Sect. 226: The repealing section, including in the 6th Schedule, ss. 22 to 31 of the Matrimonial Causes Act, 1857, and ss. 1 to 18 of the Administration of Justice Act, 1925.

RULES OF THE SUPREME COURT.

ORDER XXXVI.

Rule 1: The order made on the summons for directions in every cause or matter, and every order giving leave to defend under Order XIV., shall direct whether the cause or matter is to be tried by a special jury, or with a common jury, or without a jury (whether by a judge or otherwise), and shall also direct where the cause or matter is to be tried, but the mode and place of trial so directed may be subsequently altered for a sufficient cause on a summons or a notice under the summons or order for directions issued by either party without any appeal from the former direction. If the mode or place of trial is so altered the cause or matter shall thereupon be transferred to the appropriate list.

Rule 2: In every cause, matter or issue, unless under the provisions of Rule 6 of this Order a trial with a jury is ordered, the mode of trial shall be by a judge without a jury . . . .

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Rule 4: The Court or a judge may, if it shall appear desirable, direct a trial without a jury of any question or issue of fact, or partly of fact and partly of law, arising in any cause or matter which immediately before the 1st November, 1875, could, without any consent of parties, have been tried without a jury.

Rule 6: In any cause, matter or issue other than those mentioned in Rules 3, 4 and 5 of this Order, upon the application . . . . of any party thereto for a trial with a jury of the cause, matter or issue, an order shall be made for a trial with a jury.

ORDER LXVIII.

Rule 1: Subject to the provisions of this Order, nothing in these Rules, save as expressly provided, shall affect the procedure or practice in any of the following causes or matters . . . . (*d*) Proceedings for Divorce or other Matrimonial Causes.

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Shipping—Collision—Navigation in Fog—Fog Signals heard abaft the Beam—Regulations for Preventing Collisions at Sea, 1910, *art.* 16—*Duty to stop apart from the Article.*

Under art. 16 of the Regulations for Preventing Collisions at Sea, a steam vessel hearing the fog signals of a vessel, apparently forward of the beam, is required to stop her engines and then navigate with caution.

The *B.*, a large liner going down Channel in a dense fog at a speed of about 4 knots, heard, on the starboard side about abeam or a little abaft it, the fog whistle of the steamship *B. G.* After the whistle had been heard four or five times more, getting louder and nearer and apparently still on the same bearing, the master of the *B.* decided that he must act. He accordingly starboarded and increased his engine power to assist the helm. The *B. G.* then came into sight 100 to 150 yards away on the starboard side, crossing the bows of the *B.* from starboard to port, and the two vessels came into collision:—

Held (1.), that the main cause of the collision was the bad navigation of the *B. G.* (inter alia) in altering her course in fog, proceeding at excessive speed, and failing to stop on hearing the whistle of the *B.* forward of her beam; but:—

(2.) (Greer L.J. dissenting), that the *B.* was also partly to blame, inasmuch as the fact that the fog signals of the *B. G.* were getting louder and nearer on the same bearing was a clear indication of danger, and that accordingly good seamanship required the *B.* to stop after hearing the second or third blast, when those on board would know for certain that the other ship was approaching and causing risk of collision. Both

vessels accordingly held to blame, the *B. G.* to the extent of 80 per cent. and the *B.* 20 per cent.

Per Scrutton L.J.: The conclusion on the authorities is that in fog, unless the vessel hearing a whistle is quite clear that to continue course and speed will not involve risk of collision, she should always stop her engines.

Judgment of Bateson J. ante p. 21 affirmed.

APPEAL and CROSS-APPEAL from a judgment of Bateson J. sitting with Trinity Masters. (1)

The plaintiffs were the owners of the steamship *British Grenadier*; the defendants were the owners of the steamship *Bremen*. The *Bremen*, a quadruple screw steamship of 51,656 tons, 939 feet in length, was going down the English Channel in a dense fog at a speed of about four knots, when she heard abeam or a little abaft it the fog whistle of the *British Grenadier*. After the whistle had been heard four or five times more, getting louder and nearer and still on the same bearing, the master of the *Bremen* decided that he must act. He accordingly starboarded and put his engines from slow to full speed ahead to assist his helm. The *British Grenadier* then came in sight 100 to 150 yards away on the starboard side, crossing the bows of the *Bremen* from starboard to port, and the two vessels came into collision.

Under art. 16 of the Regulations for Preventing Collisions at sea, a steam vessel hearing the fog signals of a vessel, apparently forward of the beam, is required to stop her engines and then navigate with caution.

Bateson J. held that while the main cause of the collision was the bad navigation of the *British Grenadier* (2), the *Bremen* was also to blame, because, although not obliged to stop under art. 16, good seamanship required her to stop after hearing the second or third blast of the *British Grenadier*, when the master would have known for certain, from the fact that the signals were getting louder and nearer on the same bearing, that the *British Grenadier* was approaching with risk of collision. He accordingly held both vessels to blame,

(1) Ante p. 21.

(2) The particulars in respect of which the *British Grenadier* was found to blame are summarized by the learned judge, ante p. 23.

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the *British Grenadier* to the extent of 80 per cent. and the *Bremen* 20 per cent.

The owners of the *Bremen* appealed and the owners of the *British Grenadier* cross-appealed.

W. Norman Raeburn K.C. and *R. F. Hayward* for the appellants. The master of the *Bremen* was not negligent in the course he took. He discussed the question of stopping with her officers—there was no obligation on him to stop under art. 16—and he decided that stopping might defeat the measures which the *British Grenadier* should have taken, and might take at any moment, for she was under an imperative duty to stop under art. 16. At the most the non-stopping was an error of judgment, and the master is "entitled to claim a favourable consideration for the action which he decided to take, even if it should afterwards appear that such action was not the best possible": see the observations of Sir Francis Jeune in *The Meanatchy*. (1) In *The Ceto* (2), on the question of stopping, Lord Herschell said that there was a further question "whether under the circumstances, in a dense fog and with the indications which the master .... had of the position of the other vessel, he ought by the exercise of reasonable care and prudence to have known that it was necessary to stop. For I agree that the necessity must not be such as to become manifest only when all the facts are ascertained, but must be such as would be apparent to a seaman of ordinary skill and prudence with the knowledge which he possesses at the time." The crossing rule (art. 19) naturally does not apply in fog: (*The Cathay* (3)); and the only rule which it could possibly be suggested that the master of the *Bremen* had infringed is that part of art. 29 which provides that nothing in the rules shall exonerate the master from the consequences "of the neglect of any precaution which may be required by the ordinary practice of seamen," and on the construction of the word "required" the passage above cited from the judgment in *The Ceto* (2) was adopted by the

(1) [1897] A. C. 351, 357. (2) (1889) 14 App. Cas. 670, 693.
(3) (1899) 9 Asp. M. L. C. 35.

Court of Appeal in *The Kaiser Wilhelm der Grosse* (1): see also the observations to the same effect of Brett M.R. in *The Beryl* (2) adopted by the House of Lords in *The Theodore H. Rand.* (3) The master did not know whether the *British Grenadier* was increasing or slackening her speed or altering or maintaining her course, and the fact, therefore, that the bearing of the sound of the whistle appeared to remain constant did not necessarily involve risk of collision. By keeping way on the *Bremen* and starboarding the helm her flank was being turned away and the risk of being struck amidships was lessened. The witnesses' attention was not directed to the point on which the *Bremen* has been condemned, for it was taken by the judge himself late in the proceedings.

[Reference was also made to *The Otranto.* (4)]

C. R. Dunlop K.C. and *Lewis Noad* for the respondents and cross-appellants. [The arguments on the cross-appeal that the *British Grenadier* was not to blame, or that at most she was equally to blame with the *Bremen*, are immaterial to this report, and are omitted.] The *Bremen* had received very clear indication of danger and, as the learned judge and Elder Brethren found, should have taken off her way. The duty to stop under art. 16, if the whistles had been heard apparently forward of the beam, is imperative, and under the note to art. 21, when in consequence of thick weather or other causes a vessel which under the steering and sailing rules would have to keep her course and speed, finds herself so close that collision cannot be avoided by the action of the give way vessel alone, she also "shall take such action as will best aid to avert collision." In *The Otranto* (4), under that rule the House of Lords drew attention to the fact that good seamanship requires that "first and before all things he [the master of the vessel thus called on to act] ought to have stopped and reversed his engines." The duty to stop when vessels are enveloped in fog and cannot see each other is a stringent one: see Lord Watson's observations in *The Ceto.* (5) Had

(1) [1907] P. 259, 275.
(2) (1884) 9 P. D. 137, 138.
(3) (1887) 12 App. Cas. 247, 250.
(4) [1931] A. C. 194, 203.
(5) 14 App. Cas. 670, 686.

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the *Bremen* stopped there would have been no collision. Her master was asked in cross-examination why he did not stop on hearing the first whistle of the *British Grenadier*.

Raeburn K.C. in reply. *The Ceto* (1) was decided under the Sea Rules of 1884, in which there was no rule corresponding to art. 16, and in that case also the vessels were on opposite courses and both were under a duty to stop, and Lord Watson's observations had reference to that fact. *The Otranto* (2) was not a fog collision, and stopping in that case would have given the other vessel a longer opportunity to comply with the rules and keep out of the way.

Cur. adv. vult.

June 15. The following judgments were read:—

SCRUTTON L.J. The *Bremen*, the well known Atlantic liner, and the *British Grenadier*, an oil tanker, came into collision off Dungeness in thick fog. On the collision action being tried by Bateson J., assisted by Trinity Masters, both ships were found to blame in the proportions of 80 per cent. attributable to the *British Grenadier* and 20 per cent. to the *Bremen*. Both ships appeal.

The actual hearing of the appeal took place as usual with two nautical assessors. But at the close of the hearing one of the parties brought to the attention of the Court the fact that some years before one of the assessors had been in the service of one of the parties. On inquiry this was found to be so, though, of course, none of the professional gentlemen engaged were aware of it. The service referred to was nine years ago, and there had been no pecuniary or other relations between the parties since. Of course, such a relation should have been disclosed before the hearing of the appeal commenced, though in view of the fact that judges are not disqualified from hearing a case by the fact that when at the Bar they have appeared for or against one of the parties in other cases, it is quite intelligible that the assessor should not have appreciated the necessity for

(1) 14 App. Cas. 670, 686. (2) [1931] A. C. 194, 203.

disclosure of his previous relations. The Court gave the parties the opportunity of a rehearing with other assessors, but the parties agreed, with the sanction of the Court, that the Court should treat the appeal as heard without assessors, discarding from their consideration any advice they had received from their assessors, and only considering as evidence the advice given by the assessors below.

The appeal of the *British Grenadier* can be shortly disposed of. There is, in my opinion, no ground for lessening the liability the judge has placed on her. The judge below has disbelieved her witnesses and her documents, and says he doubts whether he knows what she really was doing. She was supposed to be coming up Channel on a course N. 50, roughly N.E. She had come up from the *Royal Sovereign* light vessel full speed through fog. The collision was at 10.21 A.M. summer time. More than half an hour before, at 9.44, she had heard a whistle a long way off, which she says was the *Bremen's*. She says she was then going four knots, but for this whistle a long way off she immediately reversed full speed. Nearly ten minutes later, at 9.53, when going slow, the master says he saw a vessel ahead, which he thinks was the *Bremen*, heading across his bows to the N. or N.W. He at once went full speed astern under a hard-a-port helm, blowing three short blasts three times. This he did for eight minutes or so. He admits that he blew no long blast fog signals for nearly a quarter of an hour, up to 10.9. About 10.12 the *Bremen*, being stopped in the water, blew two long blasts, the signal she was stationary, once or twice, and then one long blast. She first heard the *Grenadier's* fog signal at 10.16. The captain of the *Grenadier* says he thought the *Bremen's* signal was on his port quarter, and that he was safe in going ahead as he did, sounding the long blast fog signal after 10.9. The judge does not believe he sounded his fog signal till 10.16. The *Bremen* was regularly sounding a very powerful whistle. What most impresses me is that the *Grenadier*, which had been steering N. 50, or N.E., starts off in dense fog, at a speed which the judge finds to be over 6 knots, but on a course of

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either 155 or 165, somewhere about S.S.E., ten points or so off her original course. This course of S.S.E., in dense fog, was right across the track of steamers going up and down Channel, and was set at a place where no one would expect a steamer to be steering S.S.E. Rye, Winchelsea, New Romney and Littlestone do not produce large steamers going across to France.

I entirely agree with Bateson J.'s summary of the faults of the *Grenadier*, and with the details of his criticism. Mr. Dunlop, for the *Grenadier*, who had expressed the opinion that her master was suffering from an hallucination when he backed away for eight minutes from something he thought he saw in front of him, rested his argument on the *Grenadier's* engine log, which he claimed to be a genuine document. The judge below, who saw the man who kept it, and the original log, did not believe him, and declined to accept the log as a genuine document. Having examined the original log myself I cannot differ from the judge below; I formed the opinion that all the entries were made at the same time, and not, as alleged, separately as each order was received.

In my opinion, there is no ground for attributing to the *Grenadier* a less percentage of blame than the 80 per cent. with which the judge has burdened her.

The appeal of the *Bremen* raises much more difficult questions. She was proceeding at a slow speed, 3 to 4 knots, in dense fog, sounding her long blast for fog at intervals of about a minute. At 10.16 she says she heard slightly abaft her beam on her starboard side a long blast. She heard it again, apparently, on the same bearing and getting louder, five or six times before the collision, at 10.21. That it appeared to be on the same bearing showed risk of collision. The *Bremen* did not stop her engines, but proceeded at the same speed, but under a starboard helm. The ships came into collision at an angle of 45 degrees leading forward on the *Grenadier*. The question is, whether, under these circumstances, the *Bremen* should have stopped as soon as the second and/or third whistle heard from the *Grenadier*,

apparently on the same bearing as the first whistle and getting louder, told her there was risk of collision.

The judge, after discussing the matter with his assessors, summarizes their joint opinion that under these circumstances the master of the *Bremen* ought to have stopped when he heard the second or third blast getting louder, and, apparently, on the same bearing. I have come to the same conclusion as the judge below, as advised by his assessors. I treat the opinions of the assessors as evidence which I must consider and form my own judgment upon. The appellants, however, are not supported by the opinion of any nautical men.

In my opinion the less ships move in fog, the better. If all ships stopped when there was fog, and either anchored or remained stationary where there was no risk of their drifting into danger of stranding, there would be no collisions. Art. 16 is imperative in requiring a vessel hearing apparently forward of her beam a fog signal to stop her engines, so far as the circumstances of the case admit, although from one whistle she cannot tell the course of the other ship or what she is doing. Lord Gorell's well-known judgment in *The Campania* (1) disposes of the suggestion that large liners must go through fog at 9 knots or so, and the same judge's remarks in *The Britannia* (2) negative the view that if the whistle heard seems a long way off the hearing vessel need not stop. In *The Aras* (3) Lord Gorell held that a steamer, after stopping her engines, was not justified in going slow ahead on the assumption that the sound of the whistle was broadening on her bow. He asked the Elder Brethren a question, which shows his view as to the course which should be adopted, the reason for it being the uncertainty of bearings of whistles in fog. Lord Gorell said: "I have asked the Elder Brethren this question: 'When the *Oakmore* continued on her course'—the explanation of that is that according to her evidence she stopped, and then, finding she was falling off, put her engines ahead again and brought herself on to

(1) [1901] P. 289, 296. (2) (1904) 10 Asp. M. L. C. 65.
(3) [1907] P. 28, 34.

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her course and kept on for something like twenty minutes—'were the indications such as to show to her master, distinctly and unequivocally, that if both vessels continued to do what they appeared to be doing they would pass clear without risk of collision?' The answer is: 'No.' Then the Elder Brethren were asked by me: 'What ought to have been done in those circumstances on board the *Oakmore*?' And their view is that she ought not to have continued on in the way she was doing, with that big steamer coming closer and closer and doing what I have already said, but that she ought to have stopped, it may be only from time to time, even at the risk of falling off somewhat, because, recollect, there is a sound signal to be given if a vessel is absolutely stopped; that even if it would not have been advisable to keep continually stopped, by a touch ahead from time to time she could have been kept sufficiently on her course and under control instead of going on for something like twenty minutes at slow speed."

Art. 16, however, only applies in terms to whistles heard, apparently, forward of the beam. The results of hearing a whistle slightly abaft the beam are not very clear, as far as the express rules are concerned. The vessels may, in fact, be on crossing courses so as to involve risk of collision. In such a case, in clear weather the *Bremen* would have to keep out of the way, and the *Grenadier* to keep her course and speed (art. 19). But Barnes J. held in *The Cathay* (1) that, in such a case, the stand-on vessel in clear weather must, in fog, not stand on, but act on art. 16 rather than on art. 21. "It seems to me that although art. 21 is a general rule, it is qualified by art. 16 in cases where the latter article applies; and this is one of those cases, because this vessel undoubtedly heard, forward of her beam, the fog signal of the *Clan Macgregor*. It is said by Mr. Walton that those on board the *Cathay* could and did ascertain the position of the whistle which was heard. I do not agree with that contention, nor do the Elder Brethren. It is clear that the captain did not, and could not, properly ascertain the position of the vessel,

(1) 9 Asp. M. L. C. 35, 36.

and was not in the least justified in assuming she would pass under his stern. To my mind, on hearing that vessel he should have stopped the engines and navigated with caution until the danger was over. If he had done so there would have been no collision. No doubt her speed was kept up until the last moment, and then she crashed into the *Clan Macgregor* and sank her. I think it would be extremely dangerous to hold that in a dense fog, when vessels can be seen only at a very short distance, the vessel, which from an ultimate knowledge of the respective courses, is shown to be the one which in clear weather should keep her course and speed is to be held to be justified in keeping her course and speed when there is such a fog that the vessels cannot see each other at all, and cannot be certain of each other's position. I hold, without any doubt, that a ship in the position of the *Cathay* ought to have stopped her engines and taken off her speed in order to comply properly with art. 16." I appreciate, of course, that in the present case the judge has found, contrary to the case of the *Grenadier*, that the *Bremen* did not hear the *Grenadier's* whistle forward of her beam. But a similar question would arise if the whistle was heard more than two points abaft the beam.

The overtaking rule (art. 24) is said to apply to vessels coming up with another vessel from any direction more than two points abaft the overtaken vessel's beam, and if by day the overtaking vessel is in doubt she must assume she is an overtaking vessel. The overtaking vessel will not become a crossing vessel as she comes up to the overtaken vessel. The limitation "by day" is inserted because by night, if the weather is clear, she will see the side lights of the overtaken vessel at less than two points abaft the beam of the overtaken vessel. The position in fog was discussed by Lord Gorell (then Barnes J.) in *The Britannia*. (1) The *Ribera* proceeding dead slow in dense fog heard the whistle of a vessel apparently overtaking her on her port quarter. The *Ribera* did not take any action for this whistle. The *Ribera* said she did not stop because she was afraid of the overtaking vessel coming up

(1) 10 Asp. M. L. C. 65, 67.

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and striking her. Lord Gorell treated this as "a flimsy excuse" and, apparently, took the view that both vessels should have stopped on hearing each other's whistles. The case is also interesting as showing Lord Gorell's considered views in the unreliability of whistle signals in fog. As art. 16 refers to whistles heard forward of the beam, and art. 24 to whistles heard more than two points abaft the beam, whistles supposed to be heard abaft the beam, but not more than two points abaft, seem to be in a position not expressly dealt with. It may be that, in view of the unreliability of the inferences to be drawn as to the position shown by sounds in fog, the master should, except in very clear cases, treat such sounds as either before the beam or more than two points abaft the beam, and in either case in fog stop his engines. He is told in art. 24 to give the benefit of the doubt, if in doubt, to the conclusion that a vessel is an overtaking ship, as defined in that rule. I think Lord Gorell's general view, as shown in his decisions, was that on hearing a whistle in fog a vessel should always stop. If every vessel acted on this, and blew whistles in fog, there would be very few collisions. The views expressed by the House of Lords in *The Otranto* (1) as to stopping if in doubt support this opinion.

The Note at the commencement of the Steering and Sailing Rules, before art. 17, emphasizes the importance of no change of bearings when two vessels are approaching, as showing risk of collision. When two cars are approaching on intersecting roads, each being visible to the other, if as the cars come on the bearing does not alter, it is common knowledge that they will arrive at the point of intersection at the same time, unless their relative speeds alter, and that the fact of no change of bearings involves risk of collision. The Note emphasizes the same point in clear weather at sea. In fog the sound of the whistle, if getting louder on the same bearing, affords a similar test of risk of collision, though not so certain because of the uncertainty of sound in fog. In the present case the *Grenadier's* whistle was heard from the *Bremen* to get louder, apparently, on the same

(1) [1931] A. C. 194, 203.

bearing, and the assessors below take the view that at the second, or certainly at the third whistle, the *Bremen* should have stopped. She could, at a speed of 4 knots, by stopping and reversing have taken her way off in 50 yards, one-sixth of her length. Complaint was made that this point as to stopping at the second or third whistle was not put to the master of the *Bremen* at the trial. But the first question put to him in cross-examination was why he did not stop on hearing the first whistle. He had given in his log, after careful consultation with his officers, the reason why he acted as he did. He appears to have acted on the view that the approaching whistle was that of an overtaking vessel "more aft than abeam," and, therefore, he need not alter his speed. But the judge's finding negatives the suggestion "that the whistle was more aft than abeam." If it were, Lord Gorell's views as expressed in *The Britannia* (1) would require the *Bremen* to stop her engines. If the whistle was heard forward of the *Bremen's* beam, art. 16 would require the *Bremen* to stop. I find it difficult to see any reason why for a whistle supposed to be between abaft the beam and two points abaft the beam, but apparently continuing on the same bearing, good seamanship did not require the *Bremen* to stop, especially in view of the difficulty of getting precise information as to the position of a ship whistling in fog.

In my opinion, in fact, if the *Bremen* had stopped when she heard the second whistle, apparently on the same bearing, the collision would not have happened, as the *Grenadier* would have passed ahead of the *Bremen* in safety. On the finding of the judge as to the respective speeds of the two ships, the *Grenadier* must have heard the *Bremen's* whistle forward of her beam and should have stopped under art. 16. If then both vessels had stopped, still less would there have been a collision. I gather the argument for the *Bremen* is that she could not really tell what the *Grenadier* was doing, and she might have been going to cross astern. But art. 16 requires the vessel hearing one whistle forward of her beam

(1) 10 Asp. M. L. C. 65.

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to stop her engines, though she cannot know from one whistle what the other ship is doing. I think the judgments of Lord Gorell already referred to point to the conclusion that in fog, unless the vessel hearing a whistle is quite clear that to continue course and speed will not involve risk of collision, she should stop her engines. And in this case the *Bremen* did, from the whistles, form the opinion that the *Grenadier* was continuing her course and speed so as to involve risk of collision if the *Bremen* kept her speed.

In my opinion the decision of the judge, and the opinion of the assessors below, as to the liability of the *Bremen* were correct, and there is no ground for interfering with the judge's proportion of damage. Each appeal fails, but to avoid any expensive taxation of the costs incurred by each respondent, there should be no costs of the two appeals.

GREER L.J. On April 24, 1930, the *British Grenadier*, a steel screw steamship of 6888 tons gross, 440 feet in length, and 57 feet in beam, came into collision with the *Bremen*, a vessel of 51,656 tons gross, 939 feet in length, and 102 feet beam, in the English Channel about 4½ miles from Dungeness. The owners of the *British Grenadier* brought an action in rem against the owners of the *Bremen* for damages due to the negligent and improper navigation of the *Bremen*. The owners of the *Bremen* defended the action on the ground that the collision and the consequent damage were not due to any negligence on their part, and they counterclaimed for the damages suffered by their vessel, alleging that the *British Grenadier* was alone to blame for the collision. Bateson J. had no difficulty in finding that the navigation of the *British Grenadier* was negligent, and that her negligence was one of the effective causes of the collision, but he held with considerable reluctance that the *Bremen* was also "somewhat" to blame, and he apportioned the damage by finding that 80 per cent. should be borne by the *British Grenadier* and 20 per cent. by the *Bremen*.

From this decision the owners of the *Bremen* appeal, and there is a cross-appeal by the owners of the *British*

Grenadier, who allege that the collision was caused entirely by the negligent navigation of the *Bremen*.

The learned judge who heard the witnesses believed the witnesses called on behalf of the *Bremen* with regard to her navigation up to the time when the two vessels came into collision, and he disbelieved the account given by the witnesses on board the *British Grenadier* with regard to her navigation, and this appeal is to be determined by accepting the learned judge's decision as to the credit to be attached to the evidence given by the witnesses on the one side or on the other. The question therefore whether the *Bremen* was in any respect to blame falls to be determined by the evidence given by those on board the *Bremen*, which the learned judge has accepted as both truthful and accurate.

It seems to me unnecessary to consider the history of the *Bremen's* navigation before 10.16 on the morning in question. There was a dense fog in the channel. The *Bremen* was proceeding down channel in a south-westerly direction at about 228 degrees true, when a whistle was heard from a vessel slightly abaft her starboard beam. She was then proceeding at about 4½ knots per hour, which the judge rightly held to be a safe speed under the circumstances, provided that she continued, as she had done coming down channel, to exercise reasonable navigating care, and to attend to the sounds made by other vessels. The whistle that sounded from slightly abaft her beam showed that if the vessel so signalling was approaching her, such vessel should, under art. 16, stop her engines, and then navigate with caution until danger of collision would be over. The *Bremen* was therefore entitled to proceed on her course giving the usual signal, as she in fact did, that she was so proceeding. When she heard the second and third signals she must have known, of course, that the approaching vessel had not stopped her engines. Her witnesses say that they judged by the sounds that the bearing of the approaching vessel continued to be the same. I understand this to mean that they knew approximately that she was not altering her direction, but was

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keeping in the same direction, and that as the sounds grew louder she was approaching the course the *Bremen* herself was on, that the two courses were bound sooner or later to intersect, and that there was therefore risk of collision. But, I think, the bearing could only be approximately judged, and I do not think that those on board the *Bremen* could ascertain exactly how near the course which the *British Grenadier* was keeping was to the course which the *Bremen* was on. The navigation of the *Bremen* is to be judged not by the event, but by what would appear to be the circumstances under which the master of the *Bremen* was called upon to act. In fact, if the *Bremen* had, on hearing the second or third whistle from the *British Grenadier*, stopped her engines, the *British Grenadier* would probably have passed ahead of her and there would have been no collision, but I do not think that those on board the *Bremen* were able sufficiently to gauge the distance the course of the *British Grenadier* was from their course, so as to enable the master to decide whether it would be safe for him to stop the engines of his vessel. If the course of the *British Grenadier* was nearer to the course of the *Bremen* than it turned out to be, the latter would have been running a very grave risk by stopping her engines and presenting what would very nearly be a broadside target to the *British Grenadier*. The master had to choose between two courses: (1.) to stop his engines and, if necessary, reverse, or (2.) to go ahead and try to keep as nearly as possible on a parallel course. He chose the latter alternative, which, by reason of facts which he could not know, was the wrong course, as events turned out; but inasmuch as if the master of the *Bremen* had taken the other course and stopped his engines, there might, so far as the facts appeared to him at the time, have been a much more serious collision than the one which in fact took place, I find it impossible to hold that this "fine seaman" (as the learned judge described him), who had navigated the vessel with conspicuous care and skill until a few minutes before the collision, was guilty of negligence in failing to appreciate that he was wrong in thinking that to stop his engines would have placed his long,

heavy and valuable ship, with its crew of 1005 hands and 971 passengers, in grave danger.

It is clear in the findings of the learned judge that the *British Grenadier* was guilty of a breach of art. 16 of the Regulations for Preventing Collisions at Sea. It is equally clear on the same findings that the *Bremen* did not break any of the express rules as to navigation in a fog. The only blame that can be alleged against her is that she neglected some precaution required "by the ordinary practice of seamen or by the special circumstances of the case" within the meaning of art. 29. This means that though she did not break any of the rules she still may be found to blame if she was negligently navigated under the circumstances. The complaint in the statement of claim with regard to the *Bremen's* failure to stop was that she failed to stop on hearing the whistle of the *British Grenadier* forward of her beam. The learned judge has found that the witnesses for the *Bremen* are right in saying that the whistle that was sounded was the whistle of a vessel abaft the *Bremen's* beam. I do not think that without an amendment of the statement of claim it was open to the *British Grenadier* to make the case that the *Bremen* should have stopped, if the *British Grenadier's* whistle was abaft her beam. Nor do I think that the examination of the *Bremen's* witnesses was directed to this point at all. Mr. Raeburn told us that the form of Mr. Dunlop's questions did not convey to his mind that the plaintiffs were alleging that even if the whistle of the *British Grenadier* was slightly abaft the beam of the *Bremen*, the *Bremen* ought to have stopped. But though the questions were put from a different point of view the captain did get an opportunity of stating why he did not stop the *Bremen*. He was asked, "If you had stopped your engines at 10.16 this collision would not have happened?" His answer is: "It would happen much dangerous—much more—because she would not hit us on the head, she might hit us right on the bridge." This accords with the account of the collision given in Captain Ziegenbien's deposition: "Together with several other signals at 10.16 A.M. the distinct navigation signal of a

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steamer was suddenly heard on starboard side from an afterly direction. Her subsequent signals becoming louder proved that she was approaching strikingly quickly. Steamship *Bremen* was heading 228 true at a speed of 3 knots. Visibility was 100–150 metres. Replying to the signal of the steamer, navigation signals were sounded in short intervals with the typhoon. The steamer approached strikingly rapidly, the signals of the steamer, from the time she was heard first until she came into sight, were heard 5–6 times and answered about 10 times. The position was unanimously judged as follows : The other vessel is an overtaking one. She is approaching from a direction more aft than abeam, without altering her bearing. Therefore our fog signals must be heard by her in any case from a forward direction. (Therefore from the moment she heard our signal for the first time, it was her duty to stop.) Stopping did not come into question for steamship *Bremen*, because : (1.) The signals of the other steamer were heard from a direction more aft than abeam. (2.) The approach of the other vessel, judging by the increasing strength of sound of her signals, took place so rapidly that there was an immediate danger of the steamship *Bremen* then being rammed broadside at a blunt angle. (3.) In case of stopping the steamship *Bremen*, the danger of the collision broad side would have remained to completely the same extent, if the other vessel reduced her speed. For these reasons at 10.19 A.M. when the signals were heard in the immediate vicinity from an afterly direction, at the moment of immediate danger, when a collision was inevitable, if the course were kept, it was tried to turn the steamship *Bremen* to port by means of hard-a-starboarding the helm, and, if possible, to bring her on to a parallel course with the invariably nearing vessel : arts. 21, 27 and 29 of the Regulations for Preventing Collisions at Sea. As altering the course at the low speed was not possible within the time still at disposal, solely by means of helm action, the intended turn had to be assisted by means of propeller action on the rudder. (With first of all ' starboard full ahead,' then ' all ahead '—working propellers and the helm ' hard over,' the vessel, according to

experience, is turned from a stationary position almost at the spot in the smallest circle)."

Sound signals in a fog can only give an approximate guide to the bearing or course of an approaching vessel. As that experienced Admiralty Judge Sir Gorell Barnes says in *The Britannia* (1): "It is not correct to say that a whistle having been heard can be located so as to be certain it is at a precise bearing on the bow." In the circumstances of this case it seems to me that the Court ought not to have found the *Bremen* guilty of negligent navigation. She was faced with the problem of dealing with an unascertainable situation. The captain could not know where the point of intersection of the two courses would be. If he stopped his engines the point of intersection might be somewhere near the amidships section of his long vessel. If the course of the *British Grenadier* should be further away than it actually was, the manœuvre that the *Bremen* executed might have brought the vessels on parallel courses, so that a collision would have been avoided, and in any case the results of a collision would by his action be much less serious than they would be if a collision took place with his ship amidships. I cannot think that the Court was right in holding the *Bremen* guilty of negligent or unseamanlike navigation. If this case fell to be determined by my judgment the appeal of the *Bremen* would be allowed with costs, and the cross-appeal of the *British Grenadier* dismissed with costs and judgment entered for the *Bremen* with costs.

I have said nothing about the assessors in this Court, because the facts have been fully stated by my Lord, but I may say that my provisional opinion was not altered when I read the answers that the assessors gave to the questions my Lord put to them.

SLESSER L.J. In this case the learned judge has accepted the history of this collision as recounted by the oral evidence and documents tendered on behalf of the *Bremen*, and rejected the evidence and documents of the *British Grenadier*, as far

(1) 10 Asp. M. L. C. 65, 67.

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as they conflict with the story told by the *Bremen*. That history has been sufficiently set out by Scrutton L.J.; I content myself, therefore, with the following facts immediately material to my judgment.

The *Bremen* was travelling down Channel on a south-westerly course at 3 to 4 knots in a thick fog at about 10 A.M. —she was sounding a powerful whistle about every minute. There is no evidence that she was off her normal course about opposite Dungeness. At about 10.16, summer time, the *Bremen* first heard a long blast abaft her beam on the starboard side. She continued to hear it five or six times, increasing in volume approximately on the same bearing. The *Bremen* did not stop her engines, but continued under a starboard helm at the same speed. At 10.21 A.M. the vessels collided at 45 degrees.

The learned judge, in agreement with the Trinity Masters, has found the *Bremen* to blame to the extent of 20 per cent. in that she should, in his opinion, have stopped, at least on hearing the third whistle of the *British Grenadier*, which was, as I have said, getting louder on the same bearing, thus indicating a convergence. It must be added that the judge has accepted the evidence of the *Bremen* that she did not hear the whistle of the *British Grenadier* forward of her beam. In these circumstances he has rightly held that art. 16 did not require the *Bremen* to stop her engines, as she did not hear the fog signal of the *British Grenadier* apparently forward of her beam. The question remains, however, whether, apart from art. 16, under art. 29 the master of the *Bremen* did not neglect a precaution which may be required by the ordinary practice of seamen or by the special circumstances of the case. The navigation of the *Bremen* is found to have been most careful coming down through the traffic. But for the last ten minutes before the collision she had been almost stopped for fog. The visibility was not more than 150 metres. Having regard to the fact that distance and bearing cannot be exactly determined in a fog: see Gorell Barnes J. in *The Britannia* (1), and that the weather

(1) 10 Asp. M. L. C. 65.

was apparently such that the *British Grenadier* could not be seen in time to avoid her, I agree with Bateson J., that the *Bremen* ought to have stopped, notwithstanding that art. 16 did not apply, or at least reduced her speed after hearing the second or third blast of the *British Grenadier*, for a time had arrived when there was certainly a serious risk of collision: see *The Ceto* (1); *The Dordogne.* (2) In *The Otter* (3) Sir Robert Phillimore said: "I am of opinion that the legislature could not have intended to lay down the rule that there may not be circumstances in which it may become the duty of a steam vessel, when she finds herself in a fog, to bring up." If the case falls within art. 16 the duty to stop is absolute; here the duty to stop or reduce speed, in my opinion, arose imperatively on hearing the whistle of the *British Grenadier* three times on the same bearing rapidly increasing in volume. Moreover, even if there were not a duty absolutely to stop, in the uncertainty of the dense fog, I think on the evidence, notwithstanding the view of the learned judge, it was scarcely possible for the *Bremen* to know whether the whistles which she heard were or were not more than two points abaft her beam. I think it is not unfair to her captain to say that, having regard to all the circumstances, including the unexpected direction from which the *British Grenadier* was approaching, that he was really in doubt whether the *Bremen* was forward of or abaft this direction. He should, therefore, as a matter of prudent seamanship, have slackened, stopped or reversed (arts. 23 and 24).

Giving every fair consideration to the rapidity with which the emergency developed and to the reckless and incalculable behaviour of the *British Grenadier*, I have come to the conclusion that for the *Bremen* to go ahead and try to keep as nearly as possible on a parallel course was not the right manœuvre, and I am glad to think in coming to a decision in this difficult question that the Trinity Masters are themselves of the same opinion. I agree, therefore, with

(1) 14 App. Cas. 670. (2) (1884) 10 P. D. 6.
(3) (1874) L. R. 4 A. & E. 203, 207.

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Scrutton L.J. that the appeal of the *Bremen* must be dismissed with the consequences by him stated.

With regard to the appeal of the *British Grenadier* I agree with my Lords that this appeal should be dismissed, and I have nothing to add.

Appeal and cross-appeal dismissed.

Solicitors for the appellants: *Constant & Constant.*

Solicitors for the respondents (and cross-appellants): *Wm. A. Crump & Son.*

E. C. M. T.

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May 20, 21.

THE CARLTON.

Shipping—Damage in Dock—Collision with Wall of Cutting—Negligence of Lock Foreman—Port of London Authority's Towage Conditions—Indemnity—Damage arising "in the course of and in connection with the towage or transport."

The plaintiffs' steamship with two tugs in the employ of the defendants, the P. L. A., fast to her, was proceeding from the Albert Dock to the Victoria Dock. The defendants' lock foreman had signalled to her to enter the narrow Cutting, some 300 feet long, between the two docks, but at about the same time he had signalled to another tug that she could enter the Cutting from the opposite end. In order to avoid collision with that tug the steamship put her engines astern, with the result that she got out of position and struck the walls of the Cutting, doing herself damage.

The defendants relied on the terms of the towage contract, which contained a clause that the owners of the ship being towed or transported would "indemnify and hold harmless the Port Authority" against claims in respect of damage of any kind "arising in the course of and in connection with the towage or transport," and whether caused or contributed to by any negligence on the part of the Port Authority's servants:—

Held, (1.) that the clause was not an indemnity against party and party claims, but only against third party claims; and (2.) that the damage did not arise "in connection with" the towage or transport; and that accordingly the shipowners were entitled to recover the amount of the damage caused by the negligence of the defendants' servant.

ACTION OF DAMAGE.

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The plaintiffs, the owners of the steamship *Carlton*, claimed from the Port of London Authority the amount of the damage suffered by the *Carlton* colliding with the walls of the Connaught Road Cutting between the Royal Albert Dock and the Royal Victoria Dock on the early morning of December 29, 1930.

The *Carlton*, a steamship of 5162 tons gross register, assisted by two of the defendants' tugs, one of which was fast ahead and the other astern, was signalled to pass through the Cutting, and the bridge over the Cutting was opened to permit her passage. As the *Carlton* and her tugs were entering the Cutting the lights of another of the defendants' tugs were seen entering the Cutting from the other end, causing, as the plaintiffs alleged, imminent danger both to herself and to the *Carlton*. The *Carlton's* engines were accordingly put full speed astern, and collision with the incoming tug, which also went astern, was averted, but the *Carlton* struck the northern side of the Cutting, and, rebounding, then struck the southern side, receiving considerable damage.

The defendants admitted that their tug *Deanbrook* had proceeded into the Cutting in accordance with orders from the defendants' lock foreman, but they denied that there was any danger either to the *Deanbrook* or to the *Carlton*, and alleged that, it being obvious that the *Deanbrook* could not pass the *Carlton* and her tugs, the *Deanbrook* backed out into the Victoria Dock, and that the order to the *Carlton* to put the engines astern was an improper one. In the alternative, it was alleged that the *Carlton* was being assisted by the defendants' tugs under a towage order, which contained (inter alia) the following conditions: "5. The owner or owners of . . . . the ship . . . . so being towed or transported hereby agree and undertake to indemnify and hold harmless the Port Authority against all claim for or in respect of . . . . loss or damage of any kind whatsoever and howsoever or whereso-ever arising in the course of and in connection with the towage or transport, and whether such loss, injury or damage be

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caused or contributed to by any negligence, default or error in judgment on the part of any officers or servants whatsoever of the Port Authority. . . . ." Under this clause the defendants alleged that if their servants were guilty of any negligence, they, the defendants, were under no liability to the plaintiffs or that the plaintiffs were bound to indemnify them in respect of any such liability.

The defendants counterclaimed in respect of the damage to the side of the Cutting, and relied on clause 4 of the towage order, which was as follows: " 4. The owner or owners of . . . . the ship . . . . so being towed or transported hereby agree and undertake to bear and pay for any loss of or damage to any of the Port Authority's property . . . . or premises occurring in the course of and in connection with the towage or transport which may arise from or be occasioned by the following causes, perils or other things, viz., perils of the seas, rivers, or navigation, collisions . . . . and whether such causes, perils or other things have been caused or contributed to by the negligence, default or error of judgment of any officers or servants of the Port Authority whatsoever." . . . .

W. N. Raeburn K.C. and *R. F. Hayward* for the plaintiffs.

J. Dickinson K.C. and *Carpmael* for the defendants.

[The cases cited and the arguments on the construction of the towage contract and its terms and conditions are fully set out in the judgment.]

BATESON J. In this case there must be judgment for the plaintiffs. The damage to the *Carlton* was due to the negligence of the defendants, and I cannot see that the *Carlton* did anything wrong. The Elder Brethren agree with me.

The accident happened to the *Carlton* shortly before 6 o'clock on December 29, 1930, in the Connaught Road Cutting, which passes between the Royal Albert Dock and the Royal Victoria Dock. The *Carlton*, a steel screw steamship of 5162 tons gross, 390 feet long and 53 feet beam, was bound to the Royal Victoria Dock from the Royal Albert Dock. In order to get from the one to the other she had to pass through

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the Connaught Road Cutting, a cutting about 300 feet long and 80 feet wide. Over the Cutting there is a road bridge, which can be swung towards the north side of the Cutting so as to allow ships to pass in and out.

The wind was fresh from the S.S.W.—that would be from the south towards the north side of the Cutting. The weather was dark and clear, and, of course, there was no tide in the dock. There were a certain number of lights about the Cutting—exactly where they were, or what sort of lights they were, I do not think was proved.

The *Carlton*, in charge of a transporting pilot, had fast to her two Sun tugs—which were at that time in the employ of the Port of London Authority—one ahead and one astern. The *Sun VIII.* was the head tug, and she was attached to the *Carlton* by a scope of rope, which allowed a space of water between the stern of the tug and the stem of the *Carlton* of about 10 feet. There was a good deal more rope out between the two, but having regard to the places on the two ships where it was made fast, and the angle from the bow down to the hook, the tug master's view was that his stern was only about 10 feet from the bow of the *Carlton*. Both tugs and ship had their regulation lights all burning. The bridge was against the *Carlton;* it had to be swung off to let her through, and a man named West was working the bridge and signalling for the purpose of letting the *Carlton* come through. The bridge was swung off, and before it was completely swung West had given instructions to a tug, the *Deanbrook*, to go through out of the Victoria Dock into the Albert Dock, the opposite way to which the *Carlton* was coming. It was a foolish thing for West to do, but the *Deanbrook*, no doubt, thought it might be a good opportunity to get out of the Victoria Dock into the Albert Dock, and she proceeded to go down the Cutting, following the bridge round—i.e., as the bridge was swinging off she was proceeding through the Cutting. She got a substantial distance through the Cutting, but before she got as far as she did ultimately, the *Carlton* was seen coming into the Cutting, West having signalled to

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the *Carlton* to come in. Thus West had told the two vessels the one to go out and the other to come in, much about the same time, but, probably, the *Deanbrook* was the first to which he signalled to come in.

The *Deanbrook* is a twin screw steam tug 90 feet 9 inches long and 21 feet beam, so that there was just room in the Cutting for the beam of the *Carlton* and the beam of the *Deanbrook*, with a few feet to spare. But as the tug saw the *Carlton* and the *Carlton* saw the tug, the courage of the tug master to go through and chance it failed him. He thought he could not get through, and so he backed out. The *Carlton* came in with her engines at slow, and the Sun tug ahead, pulling with her engines at full speed—holding the ship up to windward as well as she could. In these circumstances it was obvious to the people on the *Carlton* that the *Deanbrook* could not get past her with any hope of safety, but they did not know what she was going to do—they saw she was coming along, and she came through past where the roadway naturally crosses the Cutting—and there was considerable risk of collision under the circumstances. The *Carlton* and the *Deanbrook* went astern full speed. The tug backed away, and the *Carlton* was able to pull up sufficiently so as not to touch the tug. They got, in fact, to within 100 to 115 feet of each other as it was. In thus avoiding collision the *Carlton* got out of position. No doubt this would be helped by the propeller reversing, the wind on the port bow, and the Sun tug not being, perhaps, able to get as much angle as she might have done owing to the presence of the *Deanbrook* in the Cutting. The result, however, was that the *Carlton's* bow fell against the north side of the Cutting about 120 feet from the north-east corner and received damage. Then she bounced off and hit the other side of the Cutting with her other bow, which also received damage. It is that damage to the bows that the owners of the *Carlton* sue for in this case.

There is no question that West, who signalled both vessels to come in, was negligent. The point was made that the *Carlton* ought to have done nothing, because the tug could

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easily have backed away, and did, in fact, back away in time. I do not take that view. The *Carlton* could not possibly tell what the *Deanbrook* was going to do. She had come from the north-west angle of the Cutting down through the Cutting more than half way, and there was space for her to go past the forward end of the *Carlton*, because, of course, the bows are narrower than the broadest part of the beam; and whether she was going to try to get through before the bulk of the *Carlton* got into the Cutting, or whether the *Carlton* was coming rather faster than would permit of that, the people on the *Carlton* could not tell, and something had to be done by both, as one of the witnesses agreed. If the *Carlton* had done nothing—as was suggested by the witnesses for the defendants that she should have done—and an accident had happened it might have been a very serious one. The master of the *Carlton* was put in the position of having to choose whether he would damage the ship's side on the dock wall, or whether he would, perhaps, squeeze the tug, with very disastrous results to anybody down, below in her engine-room, and possibly sinking the tug in the Cutting.

The *Deanbrook* gave no indication as to when, or how soon, she was going to put her engines astern and back away. She never gave three blasts on her whistle, and I think that, even if it could be said that the *Carlton* could have escaped by doing nothing, ordinary prudence required her to take some step to assist in avoiding collision with the *Deanbrook*. My view is that unless both had taken action there was almost certain to have been a collision. There is no doubt that the *Deanbrook* entered the Cutting at an improper time, or that the *Carlton* had no warning about what the *Deanbrook* was going to do, and there is no doubt that the *Carlton* was approaching quicker than was anticipated by West and probably, by the *Deanbrook*. It has been so often said in this Court that vessels must get their way off in time to avoid collision, and when we find a steamer has done what has been constantly laid down is what should be done, I think it is impossible to say that the *Carlton* was the author of her own

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wrong in this case. I am satisfied that the pilot of the *Carlton* here chose the right course. It is a clear case of damage due to the negligence of the defendants, and there was no negligence of any kind on the part of the plaintiffs.

These findings, however, do not dispose of the case, because the defendants rely upon the terms of the towage contract. The contract is in these terms: "Please supply upon the terms and conditions endorsed hereon two tugs to tow the vessel *Carlton* from lock to berth, such assistance, which includes removal to and from any intermediate berth or mooring which the vessel may occupy, to be supplied at your published rate for one charge only payable by . . . . and we hereby accept and agree to be bound by the said terms and conditions."

It is clear that that is a contract for "towage" from the lock to the berth, including removal. It is called a "Towage" Order. On the back of it are the terms and conditions: "1. For the purpose of these Terms and Conditions the towage or transport shall be deemed to have commenced when the tow rope has been passed to or by the tug and to have ended when the tow rope has been finally slipped.

"2. During and for all purposes connected with the towage or transport the masters and crews of the tugs and the transport men shall cease to be under the control of the Port Authority and shall become subject in all things to the orders and control of the master or person in charge of the ship vessel or craft being towed or transported and shall be held to be identified with and to be the servants of the owner or owners of and/or the person or persons interested in the same.

"3. The Port Authority its servants and agents shall be bound before and at the beginning of the towage to exercise due diligence (*a*) to make the tug her engines equipment and gear in all respects seaworthy and fit for the said towage or transport and (*b*) properly to man equip and supply the tug.

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" 4. The owner or owners of and/or the person or persons interested in the ship vessel or craft so being towed or transported hereby agree and undertake to bear and pay for any loss of or damage to any of the Port Authority's property (including the tug or tugs engaged in such towage or transport) or premises occurring in the course of and in connection with the towage or transport which may arise from or be occasioned by the following causes perils or other things viz. :—perils of the seas rivers or navigation, collisions, strikes, lockouts, riots, civil commotions, labour disturbances or disputes or anything done in contemplation or furtherance thereof whether the Port Authority be parties thereto or not, bursting of boilers, breakage of shafts or tow ropes, breakdown of or accident to or latent defect in the tug or any portion of her equipment or gear and whether such causes perils or other things have been caused or contributed to by the negligence default or error of judgment of any officers or servants of the Port Authority whatsoever, provided always that the said causes perils or other things have not resulted from any breach by the Port Authority its servants or agents of the obligations referred to in Clause 3 hereof but the burden of proof of any such breach shall be upon the owner or owners of and/or the person or persons interested in the ship vessel or craft so being towed or transported.

" 5. The owner or owners of and/or the person or persons interested in the ship vessel or craft so being towed or transported hereby agree and undertake to indemnify and hold harmless the Port Authority against all claims for or in respect of loss of life, or injury to person or loss or damage of any kind whatsoever and howsoever or wheresoever arising in the course of and in connection with the towage or transport and whether such loss injury or damage be caused or contributed to by any negligence default or error of judgment on the part of any officers or servants whatsoever of the Port Authority provided always that such loss injury or damage has not resulted from any breach by the Port Authority its servants or agents of the obligations referred to in Clause 3 hereof but the burden of proof of any such

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breach shall be upon the owner or owners of and/or the person or persons interested in the ship vessel or craft so being towed or transported."

To summarize these clauses: By the first clause towage commences from the time the tow rope is fast and ends where it is finally slipped; the second makes the masters and crews of the tugs the servants of the hirer of the tugs; the third clause puts the obligation on the Port of London Authority to supply a proper tug properly manned; and the fourth makes the hirer liable for damage to the Port Authority's property occurring in the course of and in connection with the towage or transport arising from certain specified causes. The fifth clause, which is the one chiefly in question, is an indemnity clause. The main question argued on that clause was whether that is an indemnity against third party claims, or whether it is a clause under which the hirer is prevented from recovering for damage to his own ship. I have come to the conclusion that the clause is no more than an indemnity against third party claims. It is said to relieve the defendants from liability, because—omitting unnecessary words—the plaintiffs undertake to indemnify and hold harmless the Port Authority against all claims for damage of any kind arising in the course of and in connection with the towage caused by negligence. There is a proviso, of course, that clause 3 of the Conditions has to be complied with by the Port Authority—namely, to supply seaworthy tugs. I do not agree with that contention. The clause, I think, is framed to protect the Port Authority from third party claims, not claims made by the hirer of the tug. There is no part of this clause, to my mind, which protects the Authority from claims due to the negligence of their own servants which does not arise in the course of and in connection with the towage or transport. The damage in this case arose from the negligence of the defendants' servant, West, in the course of signalling that the road was clear for the *Carlton* to proceed. He had signalled two ships to come into the Cutting instead of only one. The negligence had nothing to do with the towage, the tugs, the crews of the tugs, or the transporting.

Transporting, I think, in this clause means either towing or shifting of ropes or heaving on the ship by means of ropes from one position to another.

If the Port of London Authority want to protect themselves from such negligence as there was in this case they ought to use clear terms, and they have not done so. The damage must arise in the course of and in connection with towage. The word is "and." It is not "or," and I think it is impossible to say that this accident, and the damage due to it, was in connection with the towage. For his contention that the clause covered not only third party claims but party and party claims Mr. Dickinson relied on the proviso. The proviso only provides that the Authority must supply seaworthy tugs and so on. Mr. Dickinson argued that because that relates to party and party obligations, clause 5, as a whole, must also relate to party and party as well as to third party. I do not see that that is necessary, as I understand the clause. Put shortly in a concrete case, it means that the Authority say to the hirer: "You indemnify me against a claim by a third party provided I give you a seaworthy tug"—which seems to be quite good sense. It does not follow, to my mind, that because the Port of London Authority have to give a seaworthy tug—which is a party and party bargain—that the shipowner must, therefore, indemnify the Authority against his own claim against them. There is no necessity to conclude that as an inference from the proviso, which makes perfectly good sense without it. It seems to me that the words "indemnify and hold harmless" are apt words for third party claims. Mr. Dickinson submitted that they mean the same as "insured." The Port Authority might have said so if that is what they meant. I think that the two cases to which I was referred of *Durnford and Great Western Ry. Co.* v. *Durnford* (*J.*) *& Son, Ld.* (1), and *The President van Buren* (2), so far as they go, support my view.

Finally, there is the Authority's counterclaim. They want a guinea or so for damage to their wall under clause 4.

(1) (1928) 44 Times L. R. 415. (2) (1924) 16 Asp. M. L. C. 444.

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Clause 4 is confined to damage occurring in the course of and in connection with the towage, and I have already stated my view as to the meaning of those words. I do not think that this damage occurred in the course of and in connection with the towage.

Moreover, I doubt very much whether what happened here —which was an accident in the regulating of a ship from one dock into another through the Cutting—is covered by the particular clause with regard to the specified causes. I am satisfied that this accident did not happen in connection with the towage, as I have said. Mr. Raeburn also raised the point that, even if they were liable, his clients would be entitled to recover over against the Authority by adding to the amount of their claim the amount of the counterclaim.

For these reasons the plaintiffs succeed, and there must be judgment for them for an amount to be found by the registrar.

Solicitors for plaintiffs: *Botterell & Roche, for Botterell, Roche & Temperley, Newcastle-on-Tyne.*

Solicitor for defendants: *J. D. Ritchie.*

E. C. M. T.

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Divorce—Practice—Permanent Maintenance—No present Case shown for Order for Maintenance of Wife—Order of Registrar—"Liberty to apply"—Order for Payment of nominal Monthly Sum—Preservation of Jurisdiction of Court to increase or diminish amount of Maintenance—Form of Order—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 190, *sub-ss.* 1, 2.

Where the Court cannot in the circumstances prevailing at the time of the application make an order for the maintenance of the wife under s. 190 of the Supreme Court of Judicature (Consolidation) Act, 1925, but is of opinion that in the event of a change in the circumstances such an order might properly be made at some time thereafter, the proper course is to make an order on the husband to pay a nominal monthly or weekly sum so as to keep alive the jurisdiction conferred upon the Court by proviso (*b*) to sub-s. 2 of s. 190, and thus enable it under that proviso to increase the periodical payments should the occasion for such an increase arise.

The insertion of the words "liberty to apply" in an order for maintenance does not enable the wife at a subsequent date to make an effective application for increased maintenance should her husband's income increase, and those words, therefore, should not form part of the order.

Decisions of Lord Merrivale P. [1930] P. 269 and Langton J. on the first point reversed.

Decision of Lord Merrivale P. [1930] P. 269 on the second point affirmed.

Appeal from two orders made by Lord Merrivale P. and Langton J. respectively.

On May 3, 1929, the petitioner Marguerite Anna Stephen obtained against her husband Thomas Arratoon Stephen a decree nisi for dissolution of her marriage on the ground of his adultery, which was made absolute on December 9, 1929.

In due course the petitioner presented a petition for permanent maintenance. There were two children of the marriage, aged respectively four and two years, of whom the petitioner had the custody. Under a marriage settlement executed on the marriage of the parties, each of them took an income of 500*l.* for life, and the survivor one of 1000*l.* for his or her life, arising out of funds provided by the husband's father.

At all material times the husband had been in receipt of a salary amounting to about 350*l.* after deduction of income

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tax as an assistant secretary of a company. The engagement was terminable on a month's notice.

The petitioner had some small means of her own amounting to about 25*l.* per annum.

On this basis the registrar on May 16, 1930, made an order that the respondent should pay to the petitioner by way of maintenance of the children 120*l.* per annum free of tax. The order proceeded: "No order for maintenance of wife; but liberty to apply thereon." The respondent appealed to the judge in chambers to vary the order of the registrar by expunging the words "liberty to apply."

On June 30, 1930, the summons was heard by Lord Merrivale P. (1) in Court who allowed the appeal and refused leave to appeal. In giving judgment, his Lordship said that this class of case had caused difficulty to the registrars in disposing of petitions for maintenance. It was obvious that the means of the wife exceeded the amount of any order that would ordinarily be made on the basis of the total joint income. The application for an order for the maintenance of the wife therefore failed, but it was said that the husband might be better off in time, and that therefore there should be liberty to apply. In his view the object of the statute was that the financial relations of the parties should be finally determined on the marriage being put an end to. Recent provision had been made for enlarging a maintenance order in the case of a wage-earning husband, but no case was presented here of a fluctuating income, and the figures denoted a set state of affairs. The question was whether he should insert in the order words postponing the allotment of maintenance. No case had been shown for keeping the matter open, and the words "liberty to apply" would be expunged from the order.

The petitioner subsequently applied to vary the order of the registrar by directing that a nominal sum might be inserted in the order to be paid as permanent maintenance by the respondent in order to preserve the jurisdiction of the Court under the proviso to sub-s. 2 of s. 190 of the

(1) [1930] P. 269.

Supreme Court of Judicature (Consolidation) Act, 1925, to increase the amount in the event of an increase in the respondent's means.

On May 11, 1931, Langton J. made an order dismissing the wife's application, considering himself bound by the previous decision of the President.

On May 19, 1931, the Court of Appeal granted special leave to the petitioner to appeal against the two orders of the President and Langton J.

The petitioner by her notice of appeal asked (1.) that the order of the President of June 30, 1930, whereby he ordered that the words "liberty to apply" should be expunged from the order of the registrar of May 16, 1930, should be set aside and that these words should be re-inserted in the order and (2.) that the order of Langton J. of May 11, 1931, whereby he dismissed the application by way of appeal by the petitioner to vary the order of the registrar of May 16, 1930, should be set aside and that the sum of 10*l.*, or such other sum as to the Court of Appeal might seem meet might be inserted in the order of the registrar to be paid as permanent maintenance by the respondent to the petitioner during the joint lives of the petitioner and respondent and until further order.

The appeal was heard on June 8, 1930.

Cotes-Preedy K.C. and *H. B. D. Grazebrook* for the wife. The power of the Court to order monthly or weekly payments to the wife was first given by s. 1 of the Matrimonial Causes Act, 1866, and that power is continued by s. 190 of the Supreme Court of Judicature (Consolidation) Act, 1925. Under s. 190 the Court has two powers: (1.) to direct the husband to secure to the wife a gross or an annual sum of money for any term, not exceeding her life (sub-s. 1); and (2.) either in addition to or instead of an order under sub-s. 1 to direct the husband to pay to the wife during their joint lives such monthly or weekly sums for her maintenance and support as the Court may think reasonable (sub-s. 2).

As at the date of the application to the registrar for maintenance the wife was not entitled to any additional sum

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for maintenance, it was necessary to insert some provision in the order in order to preserve the jurisdiction of the Court under sub-s. 2 (*b*) of s. 190 in case of an increase of the husband's means, and the words "liberty to apply" were accordingly added to the order.

[LAWRENCE L.J. The addition of the words "liberty to apply" does not make the order an order for payment of money.]

In *Shearn* v. *Shearn* (1) the question of the effect of the addition of those words was raised. It is quite clear from that case that there can be no "liberty to apply" in the case of an order to secure under sub-s. 1. But there is a distinction between the two provisions to secure in sub-s. 1 and to make periodical payments in sub-s. 2. Under the latter sub-section the Court has power to vary its orders. This view is supported by s. 196, and see *Abbott* v. *Abbott* (2) and *Turk* v. *Turk*. (3)

[ROMER L.J. You do not need to rely on s. 196. Sect. 190 is sufficient for you.]

It is submitted that the Court has power to make an order for a nominal sum to be paid to the wife in order to keep alive her right to apply again to the Court under s. 190, sub-s. 2 (*b*), in the event of an increase in the husband's means.

Noel Middleton for the husband. The order of the President expunging the words "liberty to apply" was, in the circumstances of the case, right.

The history of s. 190 of the Act of 1925 is material. Under the Matrimonial Causes Act, 1857, the only power the Court had was under s. 32 to order that maintenance should be secured. By s. 1 of the Matrimonial Causes Act, 1866, power was given to the Court to order monthly or weekly payments. Down to 1907 orders for maintenance were made either under one Act or the other, but not under both. In *Medley* v. *Medley* (4) Jessel M.R. held that an order for maintenance could not be made in the alternative for securing

(1) Ante p. 1.
(2) Ante p. 26.
(3) [1931] W. N. 140; since reported ante p. 116.
(4) (1882) 7 P. D. 122.

a gross or annual sum of money, or else for the payment of monthly or weekly sums by the husband.

By the Matrimonial Causes Act, 1884, s. 4, power was given to the Court to vary or modify orders for the periodical payments of money, either by altering the times of payment or by increasing or diminishing the amount. All the other sections of the Act dealt with restitution of conjugal rights, and since the Act periodical payments have been regarded as referring to cases of judicial separation only.

The Matrimonial Causes Act, 1907, enlarged the powers of the Court to grant maintenance but did not alter the principle on which such grants were made.

The object of the Legislature in all these Acts was to secure finality where finality was possible. By the decree absolute the marriage tie is ended and an order for maintenance must be made "on" the making of the decree: *Scott* v. *Scott.* (1) The insertion of the words "liberty to apply" offends against the rule for securing finality.

The intention of the Act of 1907, which is reproduced by s. 190 of the Act of 1925, was to enable the Court to make orders where proper provision could not be made at the time of the decree absolute. Here the wife has secured to her a sum of 500*l.* a year and her children are provided for, and there is therefore no ground for making her any further provision. It is true that orders have been made in the past for payment of a nominal sum to the wife, but that has only been in cases where the Court could not at the time make an appropriate order. To make such an order as is asked for would be to destroy all incentive to the husband to work or to save. A divorced wife ought not to have a vested right to any proportion of the husband's future earnings. Such a right would be contrary to the policy of the statutes relating to dissolution of marriage.

Cotes-Preedy K.C. was not called upon to reply.

LORD HANWORTH M.R. The facts of this case are to be found in the report of it which appears in [1930] P. 269, but

(1) [1921] P. 107.

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considering that we have to deal not only with this case but with some other decisions it may be convenient if I state them.

The petitioning wife obtained a decree nisi for the dissolution of her marriage on the ground of the adultery of the respondent husband, which was made absolute on December 9, 1929. In due course the petitioner presented a petition for permanent maintenance. There were two children of the marriage, who are infants of the ages of four and two years respectively, of whom the petitioner had the custody.

Upon the marriage of the parties a settlement was made by the father of the husband under which the financial position was that each spouse took an income of 500*l.* with the benefit of survivorship. In addition to the income enjoyed by the husband under the settlement he was also in receipt of a net salary of about 350*l.* a year. In para. 5 of his answer to the wife's petition for maintenance he states: "I am at present employed as a monthly servant in the capacity of a supernumerary secretary by Dalhousie Properties, Ld., of No. 5 Dalhousie Square aforesaid and I receive as salary in respect of my said employment the sum of Rs.400/– (approximately 30*l.* per month) that is to say an income at the rate of 360*l.* per annum or thereabouts, but from this sum income tax has to be deducted which amounts to approximately 9*l.* per annum. . . . . I am engaged monthly and my service could be terminated on one month's notice." In addition to the 500*l.* under the terms of the settlement the wife also had a small income of about 25*l.* a year. If these two figures are added together it will be found that she was entitled to a less sum as permanent maintenance than her present income of 525*l.*, with the result that this is not a case in which any order for an additional sum for permanent maintenance would be made. The report of the case before the President referred to the uncertainty of the husband's earnings, but that quality does not appear to have been brought to the attention of the President, as in his judgment he speaks of the husband as not being a wage earner, and says that the case was not

one of a fluctuating income. The figures, he said, denoted a set state of affairs. The President could not have had in his mind the facts I have extracted from the husband's answer to the wife's petition and the fact that the 350*l.* a year was subject to the chances and changes of life and of the business. When the matter came before the President the question which arose was whether the words "liberty to apply" which had been inserted in the registrar's order ought to be expunged. The President directed that those words should be deleted from the order, and it appears to us that he was right in so doing. Those words meant that the summons could be restored for consideration afresh by the tribunal seised of the matter without the taking of fresh proceedings, and perhaps thereby saving time, expense, and trouble. But where a party has a right to apply to the Court that right is not lost or diminished by the failure to add the words "liberty to apply," which only refer to procedure. The order of the President was not at first appealed from, but we have allowed a special extension of time for appealing from it in order that the whole matter may be brought before this Court. An application was subsequently made by the wife to the registrar to vary his order by directing the husband to pay to her a nominal sum under s. 190, sub-s. 2, of the Supreme Court of Judicature (Consolidation) Act, 1925, so that the Court might retain seisin of the matter. The case then came before Langton J. in chambers, and his order was that the time for appealing from the registrar's order should be extended, and he dismissed the further application that a nominal sum of 10*l.* a year should be paid by the husband under s. 190, sub-s. 2, of the Act of 1925. By special leave the order of Langton J. refusing to direct the husband to pay a nominal sum monthly or weekly has been brought before us, as well as the order of the President striking out the words "liberty to apply" from the registrar's order.

In short, therefore, the question before us is this: Is this a case in which an order should be made under s. 190, sub-s. 2, of the Act of 1925, in order to enable the Court to retain its jurisdiction and thereby safeguard the possibility

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of a change in the circumstances under which it might become right to order a sum to be paid to the wife if the husband should obtain an increase in his salary, or correlatively to enable the husband to bring the matter before the Court under the section if his income should be diminished? In other words, what is the correct order to make in a case like the present after the decree has been made absolute?

I agree with the President that the words "liberty to apply" in the registrar's order are irrelevant and incorrect. On the other hand, it is difficult in a case in which the income of the husband may be variable and sufficient income is not secured to the wife to say that the Court ought not to safeguard the position under sub-s. 2 of s. 190, so that application can be made in the future.

It is plain that under that sub-section the Legislature contemplated that in respect of any order made for the payment of a monthly or weekly sum that sum might be increased or diminished according as subsequent events might reveal themselves, therefore so far as the order for a monthly or weekly payment is concerned, the Legislature has directed under sub-s. 2 that the Court should have power to vary the amount of such payments, that is to say, that finality in the financial position cannot be reached at the termination of the marriage tie. So far as securing the payment of some sum finality is reached, and under the statute the question of securing some sum should be determined at the time when the marriage tie is put an end to. But that is not applicable to monthly or weekly payments.

By the Divorce and Matrimonial Causes Act, 1857, s. 32, it was provided that the Court might on any decree for dissolution of marriage order that the husband should secure to the wife such gross sum of money or such annual sum of money for any term not exceeding her life, as, having regard to her fortune, to the ability of the husband and to the conduct of the parties it should deem reasonable. That section dealt only with a sum which was to be secured. Nine years after that Act the Legislature felt that that was too narrow a jurisdiction to give to the Court, and therefore by

s. 1 of the Matrimonial Causes Act, 1866, power was given to the Court to order monthly or weekly payments, which was subject to the following proviso: "Provided always, that if the husband shall afterwards from any cause become unable to make such payments it shall be lawful for the Court to discharge or modify the order, or temporarily to suspend the same as to the whole or any part of the money so ordered to be paid, and again to revive the same order, wholly or in part, as to the Court may seem fit." That section allowed the order to be modified, but made no provision for an increase. The next Act affecting this matter was the Matrimonial Causes Act, 1884, s. 2 of which provided that a decree for restitution of conjugal rights should not be enforced by attachment, but that the Court might, where the application was by the wife at the time of making such decree or at any time afterwards, order that in the event of such a decree not being complied with, the husband should make the wife such periodical payments as might be just. The words "periodical payments" were there introduced for the first time. By s. 4 power was given to the Court to vary or modify orders for the periodical payments of money, either by altering the times of payment or by increasing or diminishing the amount. In 1907 these sections to which I have referred were brought together, and by s. 1, sub-s. 1, of the Matrimonial Causes Act, 1907, it was provided that the Court might on any decree for dissolution order that the husband should secure the payment of a gross or annual sum of money to the wife, and by sub-s. 2 that the Court might make an order on the husband for payment to the wife of a monthly or weekly sum for her maintenance in addition to or instead of an order under sub-s. 1. Proviso (*a*) to sub-s. 2 gave power to the Court, in the event of the husband afterwards from any cause becoming unable to make such payments, to modify the order or temporarily to suspend it as to the whole or any part of the money so ordered to be paid, and again to revive the order wholly or in part as the Court might think fit, and by proviso (*b*) the Court, after making any order under sub-s. 2, if satisfied that the means

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of the husband had increased, might increase the amount payable under the order. That was a new power to increase the amount payable. Sect. 2 repealed s. 32 of the Matrimonial Causes Act, 1857, and s. 1 of the Matrimonial Causes Act, 1866. Then came the Supreme Court of Judicature (Consolidation) Act, 1925, which in Part VIII. dealing with "Matrimonial Causes and Matters" introduced a number of sections affecting the position. Sect. 190 is the material section, though Mr. Cotes-Preedy referred to s. 196 also, but, as Romer L.J. pointed out, that section does not come into the decision of the present case. By sub-s. 1 of s. 190 the old power given to the Court under s. 32 of the Act of 1857 is reproduced directing that the husband shall secure a sum to the wife—a gross or annual sum. By sub-s. 2 the Court may direct the husband to pay to the wife a monthly or weekly sum, subject to a proviso that the Court may modify the order, or enlarge the sum payable, or discharge the order. It will be observed that in sub-s. 2 the right given in the proviso only operates after any such order has been made, that is, the order for payment of a monthly or weekly sum.

It has been contended in this case that s. 196 has reference only to the case where an order has been made for restitution of conjugal rights. In the Act of 1884 the opening words were that it was expedient to amend the law as to the restitution of conjugal rights, and each of the six sections, except s. 4, which gave the power to order monthly payments, commenced by confining the section to an application for the restitution of conjugal rights, but s. 4 did not contain those limiting words, nor does s. 196 of the Judicature Act of 1925. In Part VIII. of that Act it is difficult to find any reason why there should have been introduced any words limiting the Part to applications for restitution of conjugal rights only.

In *Scott* v. *Scott* (1) it was decided that the application for maintenance should be made "on" or within a reasonable time after the making of the decree absolute, and in *Fox* v. *Fox* (2) we held in this Court that the word "on" was to be reasonably and liberally construed. The hand of the

(1) [1921] P. 107. (2) [1925] P. 157.

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Court, therefore, is not tied by the fact that the decree has actually been made. It is plain, as the President said, that on the question of security for the sum made payable the intention of the statute is that sums to be secured should be dealt with finally when the application for securing the sums is made, that is, " on " or about the time the decree is made. There is no power given in that case to increase or decrease the amounts ordered at some future time, but that power is specially confined to securing payments. Therefore it must not be taken that in this case the Court has disturbed the practice as to the finality in reference to sums secured.

Now comes the question of sub-s. 2 of s. 190. That sub-section and the two provisoes to it indicate that the Court has power to reserve a right to increase or decrease the amount ordered to be paid, as the Legislature thought that it might be unfair to tie the husband down to the sum ordered to be paid in the case of a decrease in his means, or to tie the wife down to that sum in the case of an increase. How are those provisoes to be made operative ? Certainly not, as I have indicated, by putting in an order the words " liberty to apply." Then is there any other means ? Unless the order is made for monthly or weekly payments under sub-s. 2 the Court is powerless to make use of the provisoes for increasing or decreasing the amount ordered to be paid.

The right method is that there should be an order under sub-s. 2 for some small payment to be made monthly or weekly, and then the power of the Court to vary the order is preserved.

In *Shearn* v. *Shearn* (1) it was held that the Court had no power to reserve liberty to apply for security in making an order for maintenance under the Act of 1925, s. 190, sub-ss. 1, 2, on a decree for divorce ; that the insertion of such a provision would permit the conversion at a subsequent date of an order to pay maintenance into an order to secure it, and that would be ultra vires the statute. What Hill J. intended to decide there was that an order for a sum to be secured was a final order, but not that, in respect of an order made under sub-s. 2, there was no power to review it. In the circumstances, therefore,

(1) Ante p. 1.

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we find that while there is finality with regard to the order for a sum to be secured the Court ought to preserve its liberty to exercise its powers under the provisoes to sub-s. 2, and the right method to effect that is for the Court to make an order for a monthly or weekly sum to be paid, so as to keep open the power of the Court to order an increase if the husband's means should make such a course desirable. It is perhaps unnecessary to go so far as to say that such an order should be made in every case. But in this case, where the husband is a wage earner and there is some danger of a decrease of his salary and possibility of an increase, we think the right course is that an order should be made under sub-s. 2 in order to preserve the power of the Court given by the proviso to that sub-section.

Accordingly we think that here an order should be made that the husband pay 2*s.* 6*d.* a month under sub-s. 2. The words "liberty to apply" are inapt, and must not appear in the order. The appeals will be allowed, and an order made for payment by the husband of 2*s.* 6*d.* a month during the joint lives of his wife and himself.

LAWRENCE L.J. I agree. The registrar in the circumstances prevailing when the application came before him found himself unable to make any order for the maintenance of the wife, but considered that if and when there should be any increase in the husband's means the matter might be reconsidered; he therefore gave liberty to the wife to apply, so that in case of any such increase she might make another application for maintenance.

In my opinion the learned President was right in ordering that the liberty to apply should be struck out of the order.

By s. 190 of the Supreme Court of Judicature (Consolidation) Act, 1925, the Court is given power on any decree for divorce or nullity of marriage to make an order for maintenance, and although the words "on any decree" are not to be construed too strictly, yet, as a general rule, they do not empower the Court to make an order otherwise than on, or within a reasonable time after, the decree. Obviously the Court cannot

by inserting in its order the words "liberty to apply" reserve to itself a jurisdiction which the Act does not confer upon it. In all cases where the Court cannot in the circumstances then prevailing make an order for maintenance under s. 190, but is of opinion that in the event of a change in the circumstances such an order might properly be made at some time thereafter, I think the proper course is to make an order on the husband to pay a nominal monthly or weekly sum, so as to keep alive the jurisdiction conferred upon the Court by proviso (*b*) to sub-s. 2; and thus enable it under that proviso to increase the periodical payments should the occasion for such an increase arise. In my judgment the present is a suitable case for making an order for a nominal monthly or weekly sum, for it seems that there is a fair chance of a substantial increase in the husband's income in the future. In that event the wife might well be able to satisfy the Court that the 500*l.* a year to which she is entitled under the settlement is not an adequate sum for her maintenance. The learned registrar thought that by giving liberty to apply the wife would be enabled at any time thereafter to make an effectual application for increased maintenance if her former husband's income were to increase. For the reasons I have stated I think that that was a mistaken view, and that in the circumstances the right order to make is that stated by the Master of the Rolls.

Langton J. considered that the judgment of the President on the former application prevented him from making such an order as I have indicated, and I think that in view of the observations made by the President he was not without justification in coming to that conclusion. But in truth the only matter before the President on that occasion was the appeal by the husband against the order of the registrar in so far as it gave liberty to apply, and the observations of the learned President must be read in the light of that fact. Taken literally, the statement which he is reported to have made that in his view "the object of the statutes is that when the marriage tie is put an end to, the future relations of the parties as to money matters are then to be finally determined"

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is too broad, and cannot be supported in view of the provisoes (*a*) and (*b*) to sub-s. 2.

The appeals should be allowed and an order made in the form indicated by the Master of the Rolls.

ROMER L.J. I agree, and have nothing to add.

LORD HANWORTH M.R. There will be no costs on either side.

Appeals allowed and order of registrar varied.

Solicitors for petitioner: *Edgar Hammond & Co.*
Solicitors for respondent: *Valpy, Peckham & Chaplin.*

W. I. C.

1931
May 21, 22.

[IN THE COURT CONSTITUTED UNDER THE BENEFICES (ECCLESIASTICAL DUTIES) MEASURE, 1926.]

HUNTLEY *v.* BISHOP OF NORWICH.

Ecclesiastical Law—Inhibition—Charge of Neglect of Ecclesiastical Duties—Requirement in Writing of Performance of Duties—Condition precedent—Benefices (Ecclesiastical Duties) Measure, 1926 (16 & 17 *Geo.* 5, *No.* 8), *ss.* 1, 2, 3, *sub-s.* 1; 5.

By s. 3, sub-s. 1, of the Benefices (Ecclesiastical Duties) Measure, 1926, where the bishop has reason to think that the ecclesiastical duties of a benefice are inadequately performed he may appoint a commission to inquire into the facts, and on their report that the inadequate performance of the duties is due to the negligence of the incumbent, has power under s. 5, sub-s. 1, to inhibit him. By s. 2 (*a*) "ecclesiastical duties" include the observance of ordination promises, and also (iii.) "an obligation binding the incumbent to manifest in his acts, conduct and course of life, due respect for his sacred office, and a due solicitude for the moral and spiritual welfare of his parishioners."

A commission reported to the bishop that the ecclesiastical duties of a benefice were inadequately performed owing to the negligence of the incumbent, and also found certain charges proved which were a violation both of the ordination promises of the incumbent and of the provisions of s. 2 (*a*) (iii.). By s. 2 (*b*): "No incumbent shall be deemed to have been negligent in the observance or performance of any of his ordination promises . . . . unless such observance or performance has been required of him in writing by the bishop, who shall give him opportunity of

replying, before issuing any commission under the provisions of section three of this Measure." No such requirement was made :—

Held, that the commission had jurisdiction to hold the inquiry, although the above notice had not been given, because the inadequate performance of ecclesiastical duties charged was that of ecclesiastical duties not expressly set out in s. 2 (*b*), it being in respect of the inadequate performance of the latter only that such notice is required.

Held, further, that the requirement in s. 2 (*b*) applied only where the neglect charged was that of ordination promises, as such, or of duties imposed by the Rules for the Representation of the Laity, as such, and that the charges against the appellant were not charges of this character.

APPEAL under s. 6, sub-s. 1 (ii.), of the Benefices (Ecclesiastical Duties) Measure, 1926 (1), against inhibition.

The appellant, the Rev. S. A. Norris Huntley, Rector of Bircham Newton and Bircham Tofts, Norfolk, appealed against an inhibition by the Bishop of Norwich. On February 24, 1930, the Bishop of Norwich gave due notice under s. 3, sub-s. 3, of the above Measure to the appellant of his intention to appoint a commission under s. 3, sub-s. 1, as he had reason to think that the ecclesiastical duties of his benefice were inadequately performed. The commission sat on June 6 and 7, 1930, at the Guildhall, Lynn, the respondent being represented by counsel, the appellant appearing in person. Notice of the particulars of the charges had been served on the appellant. The commission, after hearing evidence, reported as follows : (i.) That the ecclesiastical duties of the said benefice are inadequately performed, and further that the incumbent of the said benefice raised a preliminary objection to their constitution on the ground that no requirement in writing had been made nor opportunity of replying thereto given pursuant to s. 2 (*b*) of the above mentioned Measure (1), which objection they overruled. No allegation

(1) Benefices (Ecclesiastical Duties) Measure, 1926 (16 & 17 Geo. 5, No. 8), s. 1 : " In any case where the ecclesiastical duties of a benefice are inadequately performed either by reason of the negligence of the incumbent or without negligence on his part, provision may be made under this Part of this Measure for the due performance of such duties."

Sect. 2 : " For the purposes of this Measure—(*a*) the expression ' ecclesiastical duties ' shall include (but subject to the express provisions of subsection (4.) of section three of this Measure) the observance of the several promises made by every clerk in Holy Orders upon his ordination as a deacon and as a priest, and shall also include, when used with

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was made of negligence in observance or performance of ordination promises or of duties imposed by the Rules for the Representation of the Laity. (1) And further, while making every allowance for ill-health, of which no admissible evidence was given, that (ii.) the inadequate performance of the said duties is due to the negligence of the Reverend Sidney Alfred Norris Huntley, the incumbent of the said benefice, in the following respects: (*a*) The incumbent has absented himself for long periods of time from his parish

reference to a benefice, (i.) all duties which the incumbent is bound by law to perform, (ii.) the duties imposed upon the incumbent by the Rules for the Representation of the Laity, and (iii.) an obligation binding the incumbent to manifest in his acts, conduct and course of life, due respect for his sacred office, and a due solicitude for the moral and spiritual welfare of his parishioners; (*b*) the expression 'negligence' when used with reference to an incumbent of a benefice includes wilful default in the performance of the ecclesiastical duties of his benefice; but no incumbent shall be deemed to have been negligent in the observance or performance of any of his ordination promises or the duties imposed upon him by the Rules for the Representation of the Laity unless such observance or performance has been required of him in writing by the bishop, who shall give him opportunity of replying, before issuing any commission under the provisions of section three of this Measure."

Sect. 3, sub-s. 1: "The bishop of a diocese shall have power, in any case where he has reason to think that the ecclesiastical duties of any benefice in his diocese are inadequately performed, to appoint a commission under this Measure to inquire into the facts of the case."

Sub-s. 3: "No commission shall be appointed under this Measure unless the bishop appointing the same has given to the incumbent affected one month's notice of his intention to make the appointment."

Sect. 4 provides for the report of the commission to the bishop.

Sect. 5 empowers the bishop, if the report states that the ecclesiastical duties are inadequately performed owing to the negligence of the incumbent, to appoint a curate to perform or assist in performing the duties and to inhibit the incumbent from performing all or any of those duties.

Sect. 6, sub-s. 1: "The incumbent of a benefice in respect of which the bishop has exercised any of the powers conferred on him by this Measure may appeal . . . . (ii.) if the said report states that the inadequate performance of the said duties was due to his negligence, to the court constituted under this Measure."

(1) These Rules are contained in the Schedule to the Appendix to the joint addresses of the Convocations of Canterbury and York to His Majesty on May 10, 1919, and adopted in s. 1 of the Church of England Assembly (Powers) Act, 1919 (9 & 10 Geo. 5, c. 76), the "enabling Act."

without making adequate provision for the holding of the statutory services, which have been omitted on many occasions at Bircham Tofts since Easter Day, 1926, and at Bircham Newton since Christmas, 1927. (*b*) On many occasions he failed to give any or any adequate notice when services were to be held; nor was there any system of holding them at regular hours. (*c*) During and by reason of his prolonged absences he has failed to provide facilities for baptisms, churchings, or funerals, and during such absences the duty of visitation has been neglected. (*d*) He has for some three years made no provision for instructing the youth of his parish in the Commandments, the Lord's Prayer and the Catechism. (*e*) He has on frequent occasions used obscene and other expressions quite inconsistent with a due respect to his sacred office. (*f*) He further failed to manifest such due respect in that in breach of his written undertaking dated January 27, 1927, he wilfully detained sums of money due to the Governors of Queen Anne's Bounty for payment of sinking fund and rates pursuant to the Tithe Act, 1925 (15 & 16 Geo. 5, c. 87), and collected by him as their agent, though repeatedly requested to remit the same, and (*g*) On March 31, 1929, he wilfully applied to the agent of the Marquess of Cholmondeley for tithe rentcharge, and on April 5, 1929, gave a receipt for the same as agent for the said Governors after due notice given to him (the said incumbent) that such agency had been terminated.

On August 20, 1930, the respondent, the Bishop of Norwich, appointed the Reverend Thomas Cecil Spurgin to be curate to perform the ecclesiastical duties of the said united benefice and assigned to him a stipend of 300*l.* per annum, and on the same day inhibited the appellant from performing until further notice all ecclesiastical duties of the said united benefice.

The incumbent appealed.

In the course of the hearing of the appeal evidence was called, including that of the appellant.

Elliot Gorst for the appellant. The commission had no jurisdiction. Under s. 3, sub-s. 1, of the Benefices (Ecclesiastical

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Duties) Measure, 1926, the bishop may appoint the commission when he has reason to think that the ecclesiastical duties of any benefice are inadequately performed. Here the charge was that these duties had been inadequately performed by reason of the appellant's negligence. By s. 2 (*a*) "ecclesiastical duties" include the observance of the several promises made on ordination. Therefore the appellant was charged with the inadequate performance through negligence of the ecclesiastical duty of observing his ordination promises. But by s. 2 (*b*) "no incumbent shall be deemed to have been negligent in the observance or performance of any of his ordination promises . . . . unless such observance or performance has been required of him in writing by the bishop, who shall give him opportunity of replying, before issuing any commission under the provisions of section three of this Measure." No such requirement in writing has been made in this case. Sect. 2 (*a*) is not divided into distinct compartments each defining a separate ecclesiastical duty for the breach of each of which an incumbent can be inhibited. The reasonable construction is that each compartment contains an element which, together with the performance of ordination promises, constitutes an ecclesiastical duty. It seems clear from their character that the charges in this case amount to a charge of a breach of ordination promises, and it defeats the whole object of the Measure if the provision of s. 2 (*b*) is evaded by framing the charge under s. 2 (*a*).

Sir Thomas Inskip K.C., *Wilfrid Lewis* and *J. P. Ashworth* for the respondent. Sect. 2 of the Measure of 1926 replaced s. 13, sub-s. 3, of the Benefices Act, 1898 (61 & 62 Vict. c. 48). The language of s. 2 (*a*) (iii.) of the Measure is absolutely new and was designed to overcome the difficulties which were shown to exist in the case of *Rice* v. *Bishop of Oxford*. (1) It is obvious that paras. (i.) (ii.) and (iii.) of s. 2 (*a*) of the Measure were intended and must be taken to add something to the obligation to observe ordination promises, which had been dealt with in the earlier part of the same section; they cannot be treated as mere surplusage. The

(1) [1917] P. 181.

commission can be appointed when the bishop has reason to think that the ecclesiastical duties are inadequately performed, and it is found that some of those duties, as defined in s. 2 (*a*) (iii.), were inadequately performed. The special provision as to the requirement in writing by the bishop made by the Legislature in the case where the inadequate performance of ecclesiastical duties consists in the non-observance of ordination promises, does not apply when the inadequate performance consists also in the non-observance of the requirements of s. 2 (*a*) (iii.) of the Measure.

TALBOT J. Counsel for the appellant has certainly done full justice to what was obviously a difficult case for him.

A point has been raised which was raised also before the commission by way of preliminary objection to the whole proceeding. It is based on s. 2 (*b*) of the Benefices (Ecclesiastical Duties) Measure, 1926 (1), under which this court sits, which enacts that "no incumbent shall be deemed to have been negligent in the observance or performance of any of his ordination promises or the duties imposed upon him by the Rules for the Representation of the Laity unless such observance or performance has been required of him in writing by the bishop, who shall give him opportunity of replying, before issuing any commission under the provisions of section three of this Measure." I deal with that question, reserving my opinion whether the point is open on this appeal at all, or whether it ought not to have been taken by proceedings of a different character to prevent the bishop from proceeding with the appointment of the commission or the commission from acting. Subject to that I express shortly my opinion.

Sect. 2 of the Measure upon which the question arises is by no means happily drawn. That Measure, the Benefices (Ecclesiastical Duties) Measure, 1926, is in substitution for the Benefices Act, 1898 (61 & 62 Vict. c. 48), and other

(1) Ante, p. 211, note (1).

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statutes, and it provides the machinery for dealing with cases in which it is alleged that the ecclesiastical duties of benefices are inadequately performed either by reason of the negligence of the incumbent, or without negligence. By s. 2: "For the purposes of this Measure—(*a*) the expression 'ecclesiastical duties' shall include (but subject to the express provisions of subsection (4.) of section three of this Measure)"—which exclude altogether any question of doctrine or ritual—"the observance of the several promises made by every clerk in Holy Orders upon his ordination as a deacon and as a priest, and shall also include, when used with reference to a benefice, (i.) all duties which the incumbent is bound by law to perform, (ii.) the duties imposed upon the incumbent by the Rules for the Representation of the Laity, and (iii.) an obligation binding the incumbent to manifest in his acts, conduct and course of life, due respect for his sacred office, and a due solicitude for the moral and spiritual welfare of his parishioners," and the section proceeds, as I have already said, to enact that no incumbent shall be deemed to have been negligent in the observance or performance of the ordination promises or the duties imposed by the Rules for the Representation of the Laity, unless such observance or performance has been required of him in writing by the bishop.

I think it is quite clear that the framers of that section conceived that they were by the above provisions adding something to the observance of the ordination promises. Whether in fact they were doing so may be doubted. There is no doubt that many of the matters contained in the third of those paragraphs, that is to say "an obligation binding the incumbent to manifest in his acts, conduct and course of life, due respect for his sacred office, and a due solicitude for the moral and spiritual welfare of his parishioners," would be covered also by the promises made upon ordination, which are set out in a note to the report of *Rice* v. *Bishop of Oxford.* (1) But it is to be observed that when the section goes on to require that in certain cases a notice in writing shall have been given him by the bishop

(1) [1917] P. 181, 195.

requiring the observance and performance of certain duties, it is expressly confined by the section itself to the observance or performance of any of his ordination promises or the duties imposed upon him by the Rules for the Representation of the Laity. That, I think, is a conclusive answer to the first point taken for the appellant—namely, that a requirement of that kind was a condition precedent to any commission, the reason being that here the inadequate performance of ecclesiastical duties not expressly referred to in the exception in s. 2 (*b*) is charged.

The second point taken on behalf of the appellant is more plausible. It is, that inasmuch as by s. 2 (*b*) "no incumbent shall be deemed to have been negligent in the observance or performance of any of his ordination promises . . . . unless such observance or performance has been required of him in writing by the bishop," that provision cannot be avoided by charging the same breach of duty and negligence under one of the other heads of the section; and that although it may have been charged under one of the other heads of the section, for example under (*a*) (iii.), as a breach of the "obligation binding the incumbent to manifest in his acts, conduct and course of life, due respect for his sacred office, and a due solicitude for the moral and spiritual welfare of his parishioners," yet if that duty was one of those imposed by his ordination promises the bishop cannot escape from the obligation to require observance and performance of it in writing by shaping the same charge under a different part of the section.

I am bound to say I have searched in vain for a reason for the enactment of this section in the form in which it has been enacted, or why, instead of making this requirement a condition precedent to the appointment of any commission dealing with any breach of duty, it has been limited by s. 2 (*b*) to the ordination promises and the duties imposed by the Rules for the Representation of the Laity. But it is necessary to construe this section as best one can in the light of what it says, and, as I have said, there is no doubt that the section contemplates by the obligation set out

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in para. (iii.) of s. 2 (*a*) some addition, or at least some additional ascertainment of the duties, the observance of which is promised at ordination. I think, therefore, it being clear, whatever the reason for it may be, that the intention was to select only certain duties for the purpose of making necessary a requirement in writing by the bishop, one must, in the absence of any guidance as to the principle on which it is framed, read the section with verbal accuracy, and so reading it, it appears to me that the requirement in writing is only made necessary by the Measure in a case where negligence in the observance or performance of the ordination promises is charged as such. Otherwise one would have this rather absurd result, that one would have in each case to see first of all whether any given class of conduct was a breach of the obligation defined in s. 2 (*a*) (iii.), and also whether it was a breach of any of the ordination promises. I cannot think that that is the meaning of the section, and whatever may be thought of the policy of it, I think that the written requirement by the bishop of the observance or performance of duties is only made necessary in the two cases expressly defined by the Measure, that is to say where the charges are of negligence in the observance or performance of any of the ordination promises as such or of the duties imposed by the Rules for the Representation of the Laity as such. I must say I think that if those responsible for these matters have an opportunity of reconsidering this Measure, it might well be inquired into how far amendment might place it on a somewhat more intelligible footing.

I proceed now to deal with the matters with which, under this Measure, I am appointed to deal. I have to determine, according to s. 6, sub-s. 2, whether the incumbent has or has not been negligent, and whether the ecclesiastical duties of his benefice are inadequately performed or not. That is required of me as a judge sitting in this court on the hearing of the appeal which is given in general terms by the first sub-section of s. 6. That sub-section enables an incumbent of a benefice in respect of which the bishop has exercised

any of the powers conferred on him by this Measure—in the present case the inhibition of the appellant following the report of a commission—to appeal to this court; and, as was decided in the case of *Rice* v. *Bishop of Oxford* (1), it is for the appellant to present his case first and to satisfy this court that the findings of the commission are erroneous on the questions of fact laid before them, whether the ecclesiastical duties of the benefice have been inadequately performed or whether the appellant has been negligent. First therefore there is the question whether the ecclesiastical duties of the benefice were inadequately performed when the commission made their report, and, secondly, whether that was by reason of negligence, which by s. 2 (*b*) of the Measure includes the wilful default of the incumbent. Now the report which is cited in the inhibition issued by the bishop is, in its material parts, as follows: "That the ecclesiastical duties of the said benefice are inadequately performed," and after mentioning the preliminary objection I have just discussed, it goes on: "No allegation was made of negligence in observance or performance of ordination promises or of duties imposed by the Rules for the Representation of the Laity." Then it proceeds to deal with the question of negligence. "And further, while making every allowance for ill-health, of which no admissible evidence was given, that the inadequate performance of the said duties is due to the negligence of the Rev. Sidney Alfred Norris Huntley, the incumbent of the said benefice, in the following respects." Then it sets out the particulars from (*a*) to (*g*) inclusive, already mentioned.

This court has to do two things. It has first of all to consider whether it is satisfied that the report of the commission and the facts that they have found are erroneous; but, secondly, it has to do that not by simply considering the evidence given before the commission, but by hearing the case de novo, although not in the ordinary way, where there is a rehearing, but first of all, by hearing the evidence for the appellant and then the evidence for the respondent. This

(1) [1917] P. 181.

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court has to bear in mind two things. It naturally approaches the decision of a commission of responsible persons before which the incumbent himself was represented, and which has heard the evidence, with respect and with a presumption that its report is well-founded. Secondly, the court cannot escape the duty of considering the evidence which has been called before the court on the hearing of the appeal, and, of course, of considering it with the utmost care. Now, I have to give my decision upon the findings of fact.

[His Lordship then considered the findings of the commission. With regard to (*a*), charging the omission to hold the statutory services, he came to the same conclusion as the commission.

With regard to (*b*), omission to give notice of services, Talbot J. found that the evidence entirely justified the finding.

With regard to (*c*), failure during absence to provide facilities for baptisms, etc., the learned judge found the finding justified.

As to (*d*), failure to make provision for instruction, Talbot J. found the incumbent guilty of neglect in this respect in recent years.

With regard to (*e*), the use of obscene expressions, Talbot J. said that while there was no suggestion of filthy or lewd talk, the finding was abundantly proved.

As to (*f*), wilful detention of moneys due to the Governors of Queen Anne's Bounty, the learned judge found that the finding was justified.

With regard to (*g*), receiving tithe rentcharge as agent of the said Governors after notice that his agency had been terminated, Talbot J. held that the charge was not proved, on the ground that as the incumbent, after a certain date, did not open any letters, there was no evidence that he knew that his agency had been terminated. But he found that his conduct in not opening letters was very discreditable.]

THE ARCHBISHOP OF CANTERBURY. Under the Measure by which this court is constituted it falls to the learned judge who sits beside me to determine in point of fact whether the incumbent appealing has been or has not been

guilty of negligence, and whether the ecclesiastical duties of his benefice are inadequately performed or not. He has fulfilled that heavy duty, and it is for me to accept his findings, and on the basis of those findings to give certain decisions of my own and to pronounce the judgment of the court. My own duty may be very shortly stated and fulfilled, but I regard it as none the less very responsible, and indeed solemn, for it affects the life and ministry of a minister who is in Holy Orders and a beneficed clergyman in my own Province, and it is, I suppose, because the issue is fundamentally a spiritual one that under the Measure the duty of pronouncing the judgment of the court is vested in the Archbishop. I am glad that I am required to sit with the learned judge and to hear the whole of the evidence, both because it enables me to appreciate the issues that are involved and also because, under the Measure, I have a certain amount of discretion of my own. That discretion is to determine whether, if the judge finds that the incumbent has been negligent, a curate or curates should be or should have been appointed, and also whether the incumbent should be or should have been inhibited from performing all or any of the duties of his benefice. How far I may have the power to reconsider the inhibition, or the length of the inhibition, I am not prepared to say, and I shall deal with that in another manner.

My decision is, on the basis of the findings of the learned judge, that, the learned judge having found the appellant guilty of negligence, it was reasonable and right in the interests of the parishioners that the bishop should appoint a curate in charge, and that, having regard to the nature of the offences charged against him, and found by the learned judge to have been rightly and legitimately charged, the bishop was justified in inhibiting the appellant from performing all or any of the duties of his benefice. It is, I apprehend, for the bishop himself to decide whether by virtue of the powers given to him by s. 11 of the Measure he desires to rescind in any way the inhibition which he has pronounced; but for the present, in the interests of the parishioners, I think that it must hold. It only remains for me, therefore, to give

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the judgment of the court, which is that the appeal be dismissed.

Appeal dismissed.

Solicitors for appellant: *Kingsley Wood, Williams & Co., for F. W. Beech, Eltham.*

Solicitors for respondent: *Lee, Bolton & Lee.*

W. L. L. B.

1931
July 20.

In the Estate of JOHN TALBOT CLIFTON.

Administration—Settled Land—Land settled previously to death of tenant for life—Grant of probate to trustees of settlement as Special Executors—Incapacity of Special Executor—Revocation of grant—Fresh grant to continuing Special Executor jointly with fresh personal representative of deceased—Administration of Estates Act, 1925 (15 *Geo.* 5, *c.* 23), *ss.* 22, 23. *Settled Land Act,* 1925 (15 *Geo.* 5, *c.* 18).

Probate of the will of the deceased was granted to A. B. his executor save and except settled land vested in the deceased settled previously to his death and not by his will. The deceased appointed no special executor. At his death the trustees of the settlement of the land were C. D. and E. F., and a grant of probate was made to them as special executors limited to the settled land. Before the administration of the estate was complete, C. D. became incapable of acting in the trusts and A. B. was appointed in his place for the purposes of the Settled Land Act, 1925.

On Motion to revoke the grant of probate to the special executors and for a fresh grant limited to the settled land to E. F. along with A. B.:—

Ordered that the grant of probate limited to the settled land be revoked and fresh probate granted to E. F., power being reserved to C. D. to apply for probate on his recovering capacity, and it was further *ordered* under the Administration of Estates Act, 1925, s. 23, sub-s. 2, that A. B. be appointed as a special personal representative in respect of the settled land jointly with E. F. and that the grant to E. F. after it had passed the seal be noted accordingly, the security (if any) to be given by A. B. to be settled by the Registrar.

MOTION for grant of administration to settled land.

J. T. Clifton died on March 23, 1928, having by his will, dated March 22, 1928, appointed W. Whinnerah sole executor, to whom probate was granted on August 9, 1928, save as regarded settled land vested in the deceased settled previously

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JOHN TALBOT CLIFTON, *In the Estate of.*

to his death and not by his will. The deceased appointed no special executor. The settlement of the land was dated January 31, 1907. The deceased had a life estate in the settled land with remainders in tail male. On January 20, 1926, a vesting deed was executed by the trustees of the settlement in favour of the deceased. At the death of the deceased the trustees of the settlement were J. A. S. Fair and W. Duckworth, and on October 1, 1928, a grant of probate was made to these persons as special executors limited to the settled land. Before the administration, both general and of settled land, was complete J. A. S. Fair became incapable, and on January 1, 1930, W. Whinnerah was appointed a trustee of the settlement for the purposes of the Settled Land Act, 1925, in the place of J. A. S. Fair, and the present trustees of the settlement were W. Duckworth and W. Whinnerah. It was necessary, having regard to the stage reached in the administration of the settled land, that a special personal representative of the deceased should be appointed to act along with W. Duckworth in respect of the settled land. Accordingly it was desired by all parties that the grant of probate dated October 1, 1928, should be revoked and that a fresh grant should be made to W. Duckworth along with W. Whinnerah.

On June 24, 1931, by an order made by Bennett J. in the Chancery Division, it was directed that W. Duckworth and W. Whinnerah should apply to the Probate Division for such order under its general jurisdiction and under the Administration of Estates Act, 1925, as might be necessary for the purpose of constituting W. Duckworth and W. Whinnerah special personal representatives of the deceased in respect of land subject to the settlement in the place of J. A. S. Fair and W. Duckworth. (1)

Noel Middleton moved on behalf of W. Duckworth and W. Whinnerah for an order revoking the grant of probate limited to the settled land dated October 1, 1928, and

(1) See direction of the President, dated July 31, 1928, Annual Practice (1931), p. 2454. Non-Contentious Probate Rule, 118.

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JOHN TALBOT CLIFTON, *In the Estate of.*

for an order appointing William Whinnerah as a special additional personal representative of the deceased, and that a grant of probate limited to the settled land might be made to W. Duckworth endorsed with a memorandum of the appointment of W. Whinnerah as a special additional personal representative.

[He referred to the Administration of Estates Act, 1925, ss. 22 and 23.]

The Court (BATESON J.) made the following order: that the grant of probate dated October 1, 1928, limited to settled land vested in the deceased under the Indenture of Settlement dated January 31, 1907, be revoked and probate limited to the said settled land be granted to William Duckworth one of the trustees of the said settled land at the date of the death of the said deceased, power being reserved to James Alexander Stretton Fair the other such trustee of the said settled land to apply for probate on his recovering his capacity, and it was further ordered under s. 23, sub-s. 2, of the Administration of Estates Act, 1925, that William Whinnerah be appointed as a special personal representative of the deceased in respect of the settled land jointly with William Duckworth, and that the said grant of probate to William Duckworth, after it had passed the seal, be noted accordingly. The security (if any) to be given by William Whinnerah to be settled by the Registrar.

Solicitors: *Patersons, Snow & Co., for Wilson, Wright, Earle & Co., Preston.*

R. M. M.

In the Goods of MARY MOORHOUSE SMITH.

1931
July 20.

Probate—Practice—Will—Position of Signature of Testator—Order in which Pages of Will partly printed and partly holograph are written or filled up—Wills Act Amendment Act, 1852 (15 & 16 *Vict. c.* 24).

Holograph testamentary dispositions so written as to stand after the executive clause, which was in a printed form:—

Held, to be part of the will and entitled to probate, being written before execution, and the page executed not containing any disposition.

In the Goods of Wotton (1874) L.R. 3 P. & M. 159 and *In the Goods of Gilbert* (1898) 78 L. T. 762 followed.

Royle v. *Harris* [1895] P. 163 commented on.

MARY MOORHOUSE SMITH, the testatrix, died on March 20, 1931. On August 19, 1930, she made her will on a printed form. The first page of the document, which was the printed form, began with the words, "This is the last will," and was filled in with the names of executors and directions as to place of burial, but no disposition of property, and was duly executed. The second and third pages, on which there was no printing, contained in writing the whole of the dispositions of the testatrix, and were not executed. There was an affidavit by an attesting witness that the testatrix wrote out the contents of pages 2 and 3 before she executed the will on page 1. There was a codicil dated March 1, 1931, bequeathing certain chattels, on which no question arose.

The estate amounted to 700*l.* or thereabouts. The executors moved for probate of the will, including the writing on the second and third pages.

H. B. D. Grazebrook for the executors. I rely on *In the Goods of Wotton* (1) and *In the Goods of Gilbert* (2); *In re Stalman. Stalman* v. *Jones* (3), a recent decision of the Court of Appeal, is to be distinguished. There the paper was signed at the top. In the present case all the dispositions were written before execution, and the execution may be taken as being at the foot or end of the document by taking the pages out of their order.

(1) (1874) L.R. 3 P. & M. 159. (2) 78 L. T. 762.
(3) [1931] W. N. 143.

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MARY MOORHOUSE SMITH, *In the Goods of.*

Noel Middleton for the next of kin. Pages 2 and 3 are not executed so as to comply with the Wills Act Amendment Act, 1852: *In the Goods of Wotton* (1) is distinguishable. In *Royle* v. *Harris* (2), Sir F. H. Jeune, in admitting to probate only the first page of a document, practically a replica of this one, expressly distinguished *In the Goods of Wotton* (1), pointing out that in that case the usual language of a will actually began on the second page. He says, with reference to the case before him, "I have no doubt that the words on the second and third pages were not intended to commence the will, but were, whenever they were written, intended to expand and explain the bequest to 'my sisters and friends' on the first page. Very probably they were written where they are because there was insufficient room for them after the words, 'my sisters and friends' on the first page." *Royle* v. *Harris* (3) exactly covers the present case.

BATESON J. I think I can admit the whole of the document to probate as the will of the testatrix. The difficulty has arisen because the will is on a printed form of will signed on what ordinarily would be the first page, and the disposition of the property comes on the following pages. I think that the difficulty can be got over by seeing what really happened when the testatrix made her will. The affidavit of the attesting witness says: "The legacies and directions by the testatrix contained in exhibits A and B" (which are on what are called pages 2 and 3 of the will) "were written by the testatrix first."

I think that this lady by her own hand wrote out on pages 2 and 3 the disposition of her property. Apparently it is a disposition of the whole of it. Having written that out on those pages, the pages lying flat on the table, I think she turned the document over and completed the printed portion at the end of which she put her signature, which was duly and properly attested. I think that if the transaction is reasonably and properly looked at, this lady wrote out her

(1) L.R. 3 P. & M. 159. (2) [1895] P. 163, 168.
(3) [1895] P. 163.

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Bateson J.

own will in her own hand, beginning at the beginning and finishing at the end. The beginning is, "I give to Miss Ann Ellen Cocker," and the end is, "Mary Moorhouse Smith." It is quite true that if you take the paper as a printed form of will before anything is put on it at all, you might easily call the ordinary printed portion the first page, the rest of it being in blank which could, of course, be filled up. It is also true that she put at the top of the inner sheets the figures 2 and 3, and very likely thought that she was doing quite right in calling those pages 2 and 3, but in fact she made them 1 and 2 by what she did, and finished up the page with her signature last.

I have had cases cited to me, and I think I am doing very nearly what the learned President (Sir F. Jeune) did in the case of *In the Goods of Gilbert.* (1) Sir Francis Jeune said in that case: "I am anxious to do so"—that is to assent to the view that the document there could be regarded as a whole as a will—"as I think by doing so I should be carrying out the wishes of the deceased." (I have no doubt I am doing that.) "Whether I can do so depends on the words of the Act (15 Vict. c. 24), as interpreted in the case of *In the Goods of Wotton.* (2) Hannen J. there pointed out how general the words of the Act are." There is a quotation from the case of *Wotton* (2), including these words: "Now, of course, if in this case the whole will were to be treated as following the attestation clause, the application must fail. This is the point, therefore, upon which the whole case turns." Sir F. Jeune continues: "These considerations also arise in this case. Must I hold that the second and third pages of this will follow the signature? In a physical sense they do, but beyond that I do not see that they need be regarded as following it. The second and third pages constitute a sensible will." So here. "It may be said that in the present case the initial words of the second and third pages do not constitute such an apt beginning for a will as in the case cited. That is true and there is some difference in that respect between the two cases. At the same time the second

(1) 78 L. T. 762, 763. (2) L.R. 3 P. & M. 159, 161.

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and third pages are so clearly intended to be a will that they seem to me impliedly to amount to saying: 'This is my will.' In granting probate of the document as desired, I do not think I shall be carrying the principle of *In the Goods of Wotton* (1) substantially further." That, I think, is this case. I think that if looked at properly the way in which to read this document is the way I have described—by beginning on what is called page 2 and ending with the signature. It is quite true that that brings the words, "this is the last will and testament" into the middle, but there is no magic about them. It is also true that page 1 of the will—the printed form—if it is to be called page 1, is not completed and does not really make any disposal of her property at all. It only directs that debts and funeral expenses be paid, appoints executors, and expresses the wish of the lady as to where she shall be buried. The whole point is what the lady was doing at the time that she disposed of her property, and the so-called page 1 does not dispose of it at all. *In the Goods of Wotton* (1) is a different case. There the second page begins with the words, "This is the last will and testament of Elizabeth Wotton." As I say, I do not think there is any particular virtue in those words—not half so much importance as in what you find is done with regard to the actual disposal of the property.

I do not think I am really going against what was decided in the case of *Royle* v. *Harris*. (2) The report which was relied upon by counsel for the next of kin seems to support my view. There Sir F. H. Jeune says: "I have no doubt that the fact is that the words on the second and third pages were not intended to commence the will, but were, whenever they were written, intended to expand and explain the bequest . . . . on the first page. Very probably they were written where they are because there was insufficient room for them after the words . . . . on the first page. I have assumed that the second and third pages were, in fact, written before the execution of the will." I think there is a considerable difference between an expansion of words already

(1) L.R. 3 P. & M. 159, 161. (2) [1895] P. 163, 168.

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on a page and the actual disposal of property contained entirely upon other pages.

I think that the document can be properly admitted to probate for the reasons that I have given, and that the proper way in which to read the will is the one which I have stated. Furthermore, the fact is that this lady signed the document at the end of the transaction after she had completed all the writing above her signature. Therefore I pronounce for the will and the codicil.

I did not mention that *In re Stalman. Stalman* v. *Jones* (1) was cited to me. I have not lost sight of that in my judgment.

Solicitors for the executors: *Maude & Tunnicliffe, for Halcro & Raine, Sunderland.*

Solicitors for the next of kin: *Iliffe, Sweet & Co., for J. W. R. Punch & Robson, Middlesbrough.*

(1) [1931] W. N. 143.

R. M. M.

1931
July 7, 29.

THE EDISON.

Shipping—Collision—Assessment of Damages—Objection to Registrar's Report —Damages increased owing to Poverty of Plaintiffs—Principles applicable.

In November, 1928, the plaintiffs' dredger *L.* was sunk through the negligence of the defendants, who in May, 1930, admitted liability. At the time of the accident the plaintiffs were engaged in dredging operations in Patras Harbour, Greece, under a contract with the Harbour Commissioners. The contract was a profitable one to the plaintiffs, but contained severe terms as to penalties if the work was not completed within the specified period. The plaintiffs had strained to the uttermost their resources of cash and credit to obtain the necessary plant which would qualify them to perform the contract, and had not the means to purchase another dredger when the *L.* was sunk. In order to carry on the contract, therefore, after the lapse of some time, the plaintiffs hired the dredger *A.* at a high rate. Ultimately the Harbour Commissioners purchased the *A.* and resold her on easy terms to the plaintiffs.

In assessing the damages the registrar allowed the value of the lost dredger and the expenses of hiring the *A.* The defendants moved in objection to the registrar's report on the ground that they were called upon to pay twice as much as the value of the *L.* merely because the plaintiffs happened to be too poor to purchase another :—

Held, that in first examining what the plaintiffs claimed to have lost and then testing each item by the criterion whether it was properly and necessarily incurred, the registrar had proceeded on the right principles ; that the plaintiffs were bound to minimize the damages flowing from the loss of the *L.* and were entitled to take all reasonable steps to carry out their contract with as little delay as possible, having regard to all the existing circumstances, including the severe terms of the contract and their want of liquid assets ; that consequently the hiring of the *A.* to complete an important contract was a direct and natural result of the collision and a reasonable step to take ; and that accordingly the motion in objection to the report failed.

Motion by the defendants, the owners of the steamship *Edison*, to vary the report of the Admiralty Registrar in assessing the damage sustained by the plaintiffs, the owners of the dredger *Liesbosch*.

On November 26, 1928, a collision occurred in Patras Harbour between the *Edison* and the *Liesbosch*, and the latter vessel was sunk and totally lost. On May 5, 1930, the defendants admitted liability for 95 per cent. of the proved damage, and on May 7, 1931, the Registrar made the report to which the defendants objected.

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At the time of the casualty the owners of the *Liesbosch* were under contract with the Harbour Commissioners of Patras to carry out certain excavation and other work for a sum of over 97,000*l.*, the work to be completed within three years. Subsequently, the time limit was extended to five years and the remuneration increased. The plaintiffs, having been deprived by the negligence of the defendants of the use of the *Liesbosch*, and having exhausted their financial resources in buying plant necessary for the performance of the contract, were unable to purchase another dredger, but succeeded after some delay in hiring the Italian dredger *Adria* at an admittedly high rate of hire. Later they were enabled, by arrangement with the Patras Harbour Commissioners, to purchase the *Adria* on easy terms.

In those circumstances the plaintiffs included in their claim against the owners of the *Edison* not only the value of the *Liesbosch* (put at about 9177*l.*, and in fact the purchase price of the *Adria*), but also very large items connected with the hiring of the *Adria*. The total amount claimed by the plaintiffs was 23,514*l.* 9*s.* 4*d.* The Registrar allowed them 19,820*l.* 12*s.* 7*d.*, with interest. He held that in the emergency which had arisen through the negligence of the defendants the plaintiffs had acted reasonably, and from a business point of view no fault could be found with their action. The hiring of the *Adria*, he found, was clearly a direct and natural result of the collision, and was, in the existing circumstances, a reasonable step to take.

J. Dickinson K.C. and *G. H. Main Thompson* for the defendants in support of the motion. The test properly to be applied to the question of damages of this character is normality. As Brett M.R., quoting from Mayne on Damages, said in *The Notting Hill* (1): "The first, and in fact the only inquiry in all these cases is, whether the damage complained of is the natural and reasonable result of the defendant's act." The damage which in normal circumstances would have followed from the collision was greatly increased by the

(1) (1884) 9 P. D. 105, 113.

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fact that the plaintiffs had no capital and were compelled to hire a dredger at an admittedly very high rate of hire. In *The Mediana* (1) Collins L.J. said: "Why is a millionaire from whom a picture is taken away to recover a smaller sum of money for the loss of that particular chattel, during a particular time, than A., B., and C., who have no claim to be millionaires?" This case is the exact converse. A poor man, because he is poor, should not recover more than if he were rich. The increased damage therefore arose from a cause too remote for the plaintiffs to be entitled to recover: see *Hadley* v. *Baxendale* (2); *Sharp* v. *Powell* (3); *Weld-Blundell* v. *Stephens* (4); *The Argentino* (5); *Gee* v. *Lancashire and Yorkshire Ry. Co.* (6); *H.M.S. London* (7); *The Valeria* (8); *Polemis* v. *Furness, Withy & Co.* (9); and Mayne on Damages, pp. 42 and 67.

W. Norman Raeburn K.C. and *Lewis Noad* for the plaintiffs. The assessment does not depend on the question of remoteness of damage but of minimizing the damage. If the plaintiffs had abandoned their contract the defendant would have had to pay for that loss, which might have come to considerably more. The registrar has found that it was reasonable to go on with the contract and to incur the expenses in question in order to go on with it. The plaintiffs had to take all reasonable steps to get a substitute for the lost dredger, and the circumstances of their financial difficulties must be taken into account. An innocent party is not under an obligation to keep a reserve fund for the benefit of a wrongdoer, or to mitigate damages at his own expense: see the observation of Scrutton L.J. in *Banco de Portugal* v. *Waterlow & Sons, Ld.* (10)

[LANGTON J. Were not the plaintiffs insured? Could they not have bought a new dredger with the insurance money?]

The question was not gone into at all, but very possibly the policies were pledged. When the plaintiffs hired the

(1) [1899] P. 127, 139; [1900] A. C. 113, 117.
(2) (1854) 9 Ex. 341.
(3) (1872) L. R. 7 C. P. 253, 258.
(4) [1920] A. C. 956, 979.
(5) (1889) 14 App. Cas. 519.
(6) (1860) 6 H. & N. 211, 216.
(7) [1914] P. 72.
(8) [1922] 2 A. C. 242, 246.
(9) [1921] 3 K. B. 560, 577.
(10) (1931) 47 Times L. R. 359, 361.

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dredger they did not know that they would not have to pay for it, for liability was not admitted until May, 1930. If it were a question of remoteness of damage the observations of Sir Samuel Evans in *The London* (1) would go to show that these damages are not too remote.

[Reference was also made to *James Finlay & Co.* v. *N. V. Kwik Hoo Tong H. M.* (2)]

Main Thompson replied.

Cur. adv. vult.

July 29. LANGTON J. read the following judgment: I have taken time to consider my judgment in this case, not because I have entertained any considerable doubt as to the correct determination of the matter, but because it has been urgently pressed upon me by Mr. Dickinson on behalf of the defendants that the main question in issue raises a novel and most important point in the law of damages. It was not without regret that I learned from Mr. Raeburn for the plaintiffs that he was unable to accede to this view. The career of a pioneer in almost any field is touched with the glamour of adventure, and possesses a certain attractiveness even in the comparatively humdrum domain of the law. It was accordingly disappointing to hear from Mr. Raeburn that the case presented no opportunity for blazing a trail for the enlightenment of future generations, and was in truth confined to a very ordinary question of fact which the registrar had already determined in his favour.

The case comes before me upon motion in objection to the registrar's report in the following circumstances.

On November 26, 1928, a collision occurred in Patras Harbour between the defendants' steamship *Edison* and a dredger called the *Liesbosch* belonging to the plaintiffs. As a result of the collision the *Liesbosch* was sunk and totally lost. On May 5, 1930, the defendants admitted liability for the collision, and on May 7, 1931, the registrar made the report to which objection is now taken. Since the main point which was raised and discussed before me was a question of principle, I do not think that it is necessary for me to go into the

(1) [1914] P. 72, 81. (2) [1928] 2 K. B. 604, 614; [1929] 1 K. B. 400, 410.

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multifarious items of the plaintiffs' claim or even to recite in detail the somewhat singular consequences of the collision out of which this claim arises.

Stated quite shortly the main chain of events is as follows :

At the time of the collision the *Liesbosch* was the property of some persons acting together as a company or syndicate to perform under contract certain extensive dredging and improvement works to the Harbour at Patras. The contract was for the important sum of 36,540,000 drachmas, and one of the terms imposed by the harbour commissioners upon the contractors was that the work should be completed within three years. The contract was subsequently enlarged to one of 68,000,000 drachmas, covering a period of five years. When one bears in mind the locus in quo it is not perhaps startling to find that a time limit for the completion of the work should have been insisted upon, or that the harbour commissioners also retained powers of imposing penalties for delay. The unusual feature of the transaction, which has led in turn to the complication of the claim, and to the determined resistance of the defendants to the payment of a large portion thereof, lies in the fact that the contractors appear to have strained to the uttermost their entire resources of cash and credit to obtain the necessary plant which would qualify them to perform the contract. The sudden and untoward disappearance of the main item of that plant—namely, the dredger *Liesbosch*, left them financially beggared, and, from the point of view of further action under their contract, temporarily paralyzed. It is not unimportant to notice at this stage that, although the collision took place on November 28, 1928, there was no admission of liability by the defendants until the month of May, 1930.

In this unhappy plight the plaintiffs with a single eye towards the preservation of what was to them a valuable contract, upon which they had already staked their all, prosecuted inquiries over a wide field with a view to replacing the lost *Liesbosch* either by purchase or by hire. The introductory statement to the plaintiffs' claim avers tersely that

they were " unsuccessful in finding one " ; but Mr. Dickinson contended, and Mr. Raeburn did not disagree, that this statement required some amplification. The result of the plaintiffs' efforts would be more accurately expressed by saying that they were unsuccessful in finding any means of paying for a dredger or of inducing any dredger-owner to part either permanently or temporarily with his property upon such security as they could offer.

Eventually, after a lengthy delay, a situation which was becoming tense between the commissioners and the contractors was relieved by a contract of hire of a dredger called the *Adria*, together with a tug and hoppers, which the contractors entered into with an Italian firm on May 4, 1929. The *Adria*, which was in Sardinia, was brought to Patras, and the contractors restarted work on June 16, 1929. In the following year the contractors, who were feeling the strain of a high rate of hire, approached the commissioners, and on June 30, 1930, the commissioners purchased the *Adria* from her Italian owners. Subsequently by a somewhat lenient contract of re-sale, dated September 5, 1930, the commissioners re-sold the *Adria* to the contractors upon a scheme comprising monthly payments extending over four years. By means of these involved and rather tortuous transactions the plaintiffs were eventually able to carry on this contract upon which their fortunes had been so liberally embarked, but the course adopted was naturally attended by heavy expense.

The plaintiffs presented their claim under five heads: (i.) The actual value of the lost *Liesbosch*, together with certain expenses attendant upon the purchase of the *Adria* ; (ii.) expenses incurred during the period November 26, 1928, to June 16, 1929—that is, the period during which the plaintiffs were unable to carry on any of the work of dredging, but were obliged to maintain certain members of their staff and minor items of plant ; (iii.) the hiring expenses of the *Adria* from May 4, 1929, to June 30, 1930 ; (iv.) extra cost of operating the *Adria* as compared with the *Liesbosch* ; and (v.) loss of profit owing to cessation of all work under the

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contract for the period November 26, 1928, to June 16, 1929. The registrar, after hearing evidence, allowed part (i.) of the claim in full. With certain reductions he also allowed the larger portion of parts (ii.), (iii.) and (iv.), and about one-third of the amount claimed under part (v.).

Mr. Dickinson had objections to all the allowances under each part, which I will notice more in detail presently; but the real gravamen of his objection, which lay at the root of his argument, was that the defendants were being called upon to pay not only for the replacement of what they had destroyed, but for a chain of remote consequences which sprang from the commercially indecent poverty of the plaintiffs and not from the wrongdoing of the defendants. His proposition of law was that a defendant, either in contract or in tort, is by law obliged to make good the normal and only the normal consequences of his misdeeds. It is not, he said, a normal consequence of a tort that a plaintiff should be so poor as to be unable to carry on his business by reason of the tort, more especially when the business happens to be a very expensive one, involving the expenditure of comparatively large sums even while the work thereof is being held in abeyance. If I may venture to summarize and paraphrase his argument, it was that damages in law are awarded by way of restitution and not in relief of destitution.

In support of this not unattractive proposition, Mr. Dickinson took me through many familiar and one or two unfamiliar cases concerning the remoteness of damage. Amongst others he cited old and well-tried authorities such as *Hadley* v. *Baxendale* (1); *Sharp* v. *Powell* (2) and *The Mediana* (3), and found passages to assist him in the modern cases of *The London* (4); *Weld-Blundell* v. *Stephens* (5), and *The Valeria* (6). The pronouncement from amongst these which seemed to me to come nearest to his proposition is in the judgment of Lord Collins when sitting as a Lord Justice in *The Mediana* (3): "In the present case," said the Lord Justice, "there

(1) 9 Ex. 341.
(2) L. R. 7 C. P. 253.
(3) [1899] P. 127, 139.
(4) [1914] P. 72.
(5) [1920] A. C. 956.
(6) [1922] 2 A. C. 242.

was a stand-by, but the consequences would be serious if the fact that the board had a stand-by deprived them of damages as decided in the Court below. It would mean that, apart from special damage, the damages to the rich man must be different from the damages to the poor man, if you are to assess them differently where a man has many of some particular kind of chattel, and where he has only one. Why is a millionaire from whom a picture is taken away to recover a smaller sum of money for the loss of that particular chattel, during a particular time, than A., B. and C., who have no claim to be millionaires? There is no principle involved: it is merely a matter of prejudice." From this Mr. Dickinson argued that since a man was to have no less damages because he happened to be rich, so he can have no more if he happened to be poor. In the present case the defendants are being called upon to pay twice as much, or more than twice as much as the value of the article destroyed merely because the plaintiffs happened to be poor. It follows, says Mr. Dickinson, that the damages consequent upon the mere poverty of the plaintiffs are too remote and cannot be recovered in law.

Simple and lucid as this reasoning may appear to be, it seems to me to be based upon a fallacy. Lord Collins does not say, and surely does not mean to say, that the damages for injuring A. must always be the same in amount as the damages for inflicting a like injury upon B. Take the simplest and commonest illustration: a highly skilled and highly successful surgeon and a navvy each suffer the loss of their right hand in the same railway accident. Will the Court or even a jury award them the same sum by way of compensation in damages? Is it not rather true to say that the Court will direct itself or the jury to assess the damages in each case upon the same principle—namely, what is the worth to each plaintiff of what he has lost? I am of opinion that this is exactly what Lord Collins means; the sum may be very different, but the principle is the same, and the principle is not determinable and in some cases not assisted by looking to the financial situation of the plaintiff.

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To my mind the proper method of approach to this case is not to commence by straining one's imagination after a notional phantom which will be recognizable when intellectually captured as "the normal dredger-owner," and having first determined what he would have suffered by the loss of his dredger, to proceed to rule out all other items of damage as too remote. I think the correct method is first to examine what these plaintiffs actually claim to have lost, and to test each item by the plain criterion whether it was properly and necessarily incurred. It is along this pedestrian path that the learned registrar appears to have proceeded, and it is the path which I propose to follow. In the reasons for his report the registrar enunciates the law applicable to the situation as follows: "The plaintiffs were then entitled to take all reasonable steps in this emergency to carry out their contract with as little delay as possible, having regard to all the existing circumstances, such as the severe terms of their contract in regard to penalties, and their want of liquid resources. They were equally bound to minimize the damages flowing from the sinking of the *Liesbosch* by the defendants' vessel." This appears to me to be a comprehensive and unexceptionable statement both of the rights and the duties of the plaintiffs in the circumstances. He then proceeds to state his findings of fact in the following succinct terms: "In our opinion in the emergency which had arisen through the act of the defendants the plaintiffs acted reasonably, and from a business point of view no fault can be found with their action. The hiring of the *Adria* to complete an important contract with a public body was clearly a direct and natural result of the collision and was, as we find, under the existing circumstances, a reasonable step to take. It follows from this finding of fact that the plaintiffs are entitled to recover reasonable expenses from November 26 to June 16, and also those incurred in hiring the *Adria*, together with the extra costs of operating the *Adria* as compared with the dredger *Liesbosch*." I hardly think that it is open to me to disturb these findings and even if I possess the right I do not see my way to exercise it.

It remains to notice in detail the several objections put forward by Mr. Dickinson on behalf of the defendants. As to part (i.) of the claim he criticized only the amount and not the principle upon which it was allowed, but he did not develop his criticism under this head very far in view of the obvious answer that amount must always be a matter for the registrar. As to part (ii.), although from one point of view his criticism might also be said to go to amount, he claimed as matter of principle that in any event the plaintiffs should only be allowed a reasonable time in which to find a new dredger. He suggested that two months rather than eight months was in the circumstances a reasonable time. His main objection that the damages claimed were too remote was the basis of this criticism under part (ii.) and extended to the whole of parts (iii.), (iv.) and (v.), and he asked that all of these three latter parts should be disallowed in toto. With this main objection I have already attempted to deal.

I have endeavoured to indicate in this judgment that my sympathy with the defendants is very considerable. I can imagine few things more maddeningly provoking than to be called upon, as a consequence of sinking a somewhat elderly dredger, to pay a sum amounting to more than twice her value when generously computed. I cannot, however, extend this sympathy to the point of doing violence to what I think to be the law of damages; and I was appositely reminded by Mr. Raeburn of a dictum of Scrutton L.J. in *Banco de Portugal* v. *Waterlow & Sons, Ld.* (1): "To that must be added the qualification that the plaintiff was not bound to injure himself, his character, his business, or his property to lessen the injury caused by the wrongdoer: see *James Finlay & Co.* v. *N. V. Kwik Hoo Tong Handel Maatschappij.*" (2) This seems to me to be particularly apposite in considering the conduct of the plaintiffs in the present case.

If the argument of the case by the respective counsel suffered somewhat from the fact that they were quite unable to agree as to the point to be argued, and therefore dealt each with their own contention rather than with that of the

(1) 47 Times L. R. 359, 361. (2) [1929] 1 K. B. 400.

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other side, the several arguments at least lacked nothing in incisiveness; but in spite of this it is pleasant to be able to record that an agreement was reached concerning one minor item. In the notice of motion, paragraph 5, it was claimed that an item in part (i.) of the claim relating to notarial fees had been abandoned before the registrar. Mr. Raeburn, for the plaintiffs, agreed that this was so and that the report should be amended by a deduction of the sum of 30*l.* 1*s.* 11*d.* I am afraid this sum is too small to carry with it any consequences as to costs, and the motion will therefore be dismissed with costs.

Leave to appeal.

Solicitors for the plaintiffs: *Wm. A. Crump & Son.*
Solicitors for the defendants: *Thomas Cooper & Co.*

E. C. M. T.

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July 29, 30, 31.

Shipping — Carriage of Goods — Distance Freight — Conflict of Laws — Presumptions—Law applicable.

By two freight engagement notes made in Egypt between the plaintiffs, a firm carrying on business in Egypt, and the defendants, a British company with a branch office in Egypt, the plaintiffs agreed to reserve room for certain cottonseed for shipment to London by a steamer to be specified. Under a charterparty made between the owners of the Swedish steamship *A.* and the plaintiffs as charterers the *A.* loaded the cargo at Alexandria for delivery in London; and the plaintiffs, "as agents only," issued bills of lading whereby the cargo was to be delivered in London to the order of the defendants on payment of freight by them at the specified rate.

In the course of the voyage the *A.* came into collision with another vessel, and was so badly injured that she had to be towed to Cadiz, where she was found to be a constructive total loss. The cargo, accordingly, was discharged at Cadiz and delivery was taken there by the defendants.

The plaintiffs, suing on behalf of the shipowners, claimed distance (i.e., pro rata) freight, which they alleged was payable either under the law of the flag (Swedish) or the lex loci contractus (Egypt). The defendants alleged that the law of England applied, under which pro rata freight is not payable :—

Held, that all the authorities showed that the best criterion of what law was to be applied was to be found in the intention of the parties, and that, if the parties intended otherwise, the presumption was rebutted that a contract for the carriage of goods by sea was governed by the law of the flag; that looking at the circumstances broadly, and having regard (inter alia) to the facts that all the documents were in English and on English forms, that delivery and payment were to be in England, that the freight engagement notes did not specify a ship of any particular nationality, that the defendants were a British firm, and that the British position in Egypt had for many years been predominant, the inference was that the parties—who as business people must be taken to have intended what was most convenient—intended English law to apply; and that consequently the claim for distance freight failed.

Preliminary point of law in an action in personam brought by "J. P. Mitchell and L. Polnauer (a firm)" against Behrend & Co., Ld., for distance freight on the carriage of cottonseed on the Swedish steamship *Adriatic*. The plaintiffs were a firm carrying on business in Egypt and the Sudan, the principal office being at Alexandria. The defendants were an English company carrying on business in London with a

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branch office at Alexandria. The preliminary point was to determine the particular law to be applied to the trial of the plaintiffs' action.

On July 9, 1929, a freight engagement note was entered into between the plaintiffs and the defendants for the shipment of cottonseed from Alexandria to London by steamer to be specified. For the purpose of carrying out that and other engagements the plaintiffs on October 11, 1929, chartered the Swedish steamship *Adriatic*, and issued bills of lading " as agents only " under which the seed was to be delivered to the defendants' order in London on payment of the freight. On November 19, 1929, a second freight engagement note was entered into between the parties.

During the voyage the steamship came into collision with another vessel and had to put into Cadiz, where she was found to be a constructive total loss. Delivery of their cargo was therefore taken by the defendants at Cadiz, without prejudice to their contention that no distance freight was payable.

All the material documents—freight engagement notes, charterparty, and bills of lading—were in English, and the bills of lading were on the form of the General Produce, Black Sea, Azoff and Danube Steamer Bill of Lading, 1890, approved by the London Corn Trade Association.

As regards the plaintiffs, Mr. Mitchell was a Scotsman and Mr. Polnauer a Hungarian. It was admitted that they were suing as trustees for the shipowners, and that if the contract between the parties was to be determined by English law, distance freight was not recoverable.

Sir Robert Aske (*W. N. Raeburn K.C.* with him) for the plaintiffs. The presumption of law is that, unless the parties intended otherwise, a contract of affreightment for the carriage of goods by sea is governed by the law of the flag. The authorities are conclusive on that point: see Scrutton on Charterparties, 13th ed., art. 7; Carver's Carriage by Sea, 7th ed., ss. 206, 207; Dicey's Conflict of Laws, 4th ed., r. 166,

pp. 644–648; and *Lloyd* v. *Guibert*. (1) There is no evidence here that the parties intended English law to apply; both parties carried on business in Egypt, the contract was arranged, and the freight engagement notes were signed, in Egypt; and no inference can be drawn from the fact that the bills of lading were in English, for that is the standard language for bills of lading. If, therefore, the law of the flag is not to be applied the presumption is that the parties intended the lex loci contractus to govern the transaction.

[Reference was also made to *Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Co.* (2); *In re Missouri Steamship Co.* (3); *The Industrie* (4); *Jones* v. *Oceanic Steam Navigation Co.* (5); *The Express* (6); *The Gaetano and Maria*. (7)]

Alfred Bucknill K.C. and *David Davies* for the defendants. The general rule of law is undoubted that the intention of the parties is the real guide: see Scrutton on Charterparties, 13th ed., note to art. 7, and the intention of the parties is a question of fact. There is abundant evidence that the contract should be construed according to English law. All the documents are in English, the bills of lading are "on a printed form in common use" (*The Industrie* (4)), disputes under the charterparty have to be settled by commercial men in London, and the plaintiffs have sought their remedy in London. In the freight engagement notes no ship was specified—the plaintiffs might have chartered a Russian or an Italian vessel—and the defendants were never put on their guard that by some law, not stated, they might be liable for distance freight, which English law does not recognize. In *Lloyd* v. *Guibert* (1) and similar cases the law of the flag was applied because no other could reasonably have been in the contemplation of the parties. The nearest case on the facts is *A/B August Freuchen* v. *Hansen* (8); the keynote of that decision was uniformity, and on the facts the present case

(1) (1865) L. R. 1 Q. B. 115.
(2) (1883) 10 Q. B. D. 521, 540.
(3) (1889) 42 Ch. D. 321.
(4) [1894] P. 58.
(5) [1924] 2 K. B. 730.
(6) (1872) L. R. 3 A. & E. 597.
(7) (1882) 7 P. D. 137, 146.
(8) (1919) 1 Ll. L. R. 393.

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is a fortiori, for in *Hansen's* case English law was applied, although both parties were Scandinavian.

[Reference was also made to *The Wilhelm Schmidt* (1) and *Chatenay* v. *Brazilian Submarine Telegraph Co.* (2)]

Raeburn K.C. in reply. The presumption in a contract of affreightment that the law of the flag applies is not really a departure from the ordinary rule, for a ship is taken to be part of the country whose flag she flies, and in dealing with a contract of affreightment the law of the flag would naturally be taken as being the lex loci contractus. The law of the flag might give the Swedish master a right of lien which English law would not give. How can the master of a foreign ship be expected to know that ? The presumption of the law of the flag is to prevent the parties from applying one law at the loading port, another at intermediate ports, and a third at the port of discharge. In *The Express* (3), heard the year after *The Wilhelm Schmidt* (1) on almost precisely similar facts, Sir Robert Phillimore gave exactly the opposite decision.

LANGTON J. This case belongs to a difficult class—in fact, I think it was only the peculiarly robust intelligence of Lord Halsbury that enabled him to describe a case of this class as " simple." I have found it particularly difficult, and I wish to say that I arrive at my judgment with the greatest possible diffidence. If I had thought that reflection would enable me to express it with greater confidence, I should certainly have deferred giving judgment in order to consider the matter. But I am afraid that I should only have reached the position which Mr. Raeburn tells me he has already reached of being able to discover that there is abundance of authority for practically every proposition that has been put forward. It will suffice, perhaps, to say that four counsel have addressed me in this case. Each of them has, in turn, captivated me by the convincing nature of his address, although neither of those who have been in the position of followers

(1) (1871) 1 Asp. M. L. C. 82. (2) [1891] 1 Q. B. 79, 82.
(3) (1872) L. R. 3 A. & E. 597.

have, in any way, repeated what was said by their colleagues in advance. That I think shows how simple it is to produce an excellent argument and an excellent authority for every kind of proposition that is germane to this case.

As between the plaintiffs and the defendants the choice lies between holding that the law applicable to the case is the law of the flag, or alternatively the law of the place in which the contract was made, which is the plaintiffs' contention, or holding that it is the law of England, which is the defendants' contention. It is perhaps noteworthy in passing to observe that those three alternatives have in reality a fourth lurking behind, in that the main arguments for saying that the proper law to apply is the law of England are re-enforced by those arguments which go to say that the lex loci solutionis—which is the law of the place where the contract is to be finally carried out—is also open to the defendants. Perhaps, therefore, it may be said that there are four alternatives—two open to the plaintiffs and two open to the defendants.

The facts of the case are succinctly set out in the statement of facts, and I need, therefore, not recite them any further. The only matter in the agreed statement of facts which has turned out not to be completely accurate is the assertion that the plaintiffs' firm was, at all material times, registered in Egypt under Egyptian law. It is a small matter, and whether it be the fact or not, my judgment would have been quite unaffected by it. There is no doubt that the firm of Mitchell & Polnauer carry on business in Egypt, and the mere fact of their registration one way or the other would not greatly strengthen or weaken the position. Otherwise, the agreed statement of facts, I think, may be taken to express the general position.

The plaintiffs' claim is for distance freight—a class of claim unknown to English law, but one which is recognized by some continental nations. Now amidst much that is obscure one thing at least appears to be completely plain. Everybody is agreed that the test, or criterion, of what law is to apply is to be found in the intention of the parties. That

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statement, I think, runs through all the authorities, and therefore I need not cite any particular authority in its favour. But how one is to arrive at the intention of the parties no authority is precise to define. Sir Robert Aske, on behalf of the plaintiffs, commenced his argument by pointing to certain presumptions, and he began with the excellent authority of Professor Dicey's Conflict of Laws, 4th ed., p. 644, r. 166b, which is as follows: "Subject to the exception hereinafter mentioned, the effect and incidents of a contract of affreightment (i.e., a contract with a shipowner to hire his ship, or part of it, for the carriage of goods) are governed by the law of the flag. Provided that the contract will not be governed by the law of the flag if, from the terms or objects of the contract, or from the circumstances under which it was made, the inference can be drawn that the parties did not intend the law of the flag to apply." Now that is a statement as to a presumption that the law of the flag will apply unless the evidence shows that the parties intended something else. Mr. Raeburn further elucidated the position as regards presumptions by reminding me that in ordinary cases of contracts the usual presumption of law was that the lex loci contractus was the law which applied. He said that that presumption in a contract of affreightment was no departure from the ordinary rule, but was in effect only the application of it in that a ship must be taken to be a part of the country whose flag she flies. Therefore, when dealing with a contract of affreightment, the law of the flag would naturally be taken to all intents and purposes as the actual lex loci contractus. That, I think, states the presumption of law as accurately as it can be stated, and what I have to determine here is whether in all the circumstances (and I am entitled and indeed bound to look at all the surrounding circumstances) there is evidence to show that the intention of the parties was to displace that prima facie presumption.

Turning to the facts of the case, Mr. Bucknill reminded me that there are three principal documents which are recited in the statement of claim. The first is a charterparty

between the owners of the *Adriatic*, who were a Swedish company, the Atlantic Transport of Sweden, and the plaintiffs, Messrs. Mitchell & Polnauer. Mr. Raeburn said, as regards that charterparty, that it was a comparatively irrelevant document. The shipowners were not parties to this action, and the charterparty was in no way incorporated in the bills of lading and, therefore, the defendants had no knowledge of the charterparty. Now, that at first sight seems to be an accurate statement of the case, but I am not quite sure that it is a comprehensive statement. The plaintiffs, it is true, are Messrs. Mitchell & Polnauer, but, seeing that the claim is for distance freight—and therefore a claim which is in reality a claim on behalf of the shipowners —I am not sure that it is correct to say that the charterparty is an irrelevant document or that it is even comparatively irrelevant. I think it is, in this case, part of the surrounding circumstances of the case. The essence of the matter, as appears from the statement of facts, was this. The defendants were anxious to get transport for certain parcels of cottonseed. The step that they took to this end was to engage space by certain freight engagement notes with the plaintiffs. The freight engagement notes did not specify in any way the identity or nationality of the ship. The plaintiffs merely engaged the ship to carry cottonseed from Alexandria to London and stated the form of bill of lading which would be used for that shipment. Indeed, so much did the plaintiffs deal with the matter as concerning only themselves, that although one of these freight engagement notes was entered into subsequent to the charterparty, they did not even then tell the defendants—I am not suggesting that they were wrong in not doing so—that the ship on which they were proposing to ship this parcel was of any particular nationality, nor did they in any way reveal her identity. In the meantime they had, by this charterparty, chartered the *Adriatic* to load a full cargo from Alexandria to London. I think, therefore, it is material to look at the charterparty. I do not say for one moment that the charterparty forms any part of

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the contract between the parties to this action, but I bear in mind the fact that Messrs. Mitchell & Polnauer, having no claim for this distance freight upon their own account, are claiming only as trustees for the shipowners, and I think in these circumstances that it is relevant at least to look at the bargain between themselves and the shipowners as one of the surrounding circumstances. When one looks at that document—I agree that it is the least important of the three—nothing more English than that document could very well be devised. It is on the printed form of the well known charterers, Messrs. Fred. C. Lohden & Co., of St. Mary Axe, London. It was entered into between those brokers and Messrs. Matthews, Wrightson & Co., another equally well known firm of London brokers. It was entered into in English, with every circumstance accompanying the ordinary English charterparty, including the agreement that any dispute under the charter should be settled by arbitration in London, each party appointing an arbitrator, and that the decision of the umpire selected by them should be final. It indeed has no feature about it whatever which could suggest that any law other than English law was ever for one moment contemplated as the law governing that document. One passes then to the freight note. It is headed "Alexandria, Egypt," and the plaintiffs, Messrs. Mitchell & Polnauer, unquestionably are a firm carrying on business in Egypt. It transpired that Mr. Mitchell is by birth a Scotsman, and Mr. Polnauer a Hungarian. There is no doubt that this engagement was entered into in Egypt, and, indeed, the defendants' firm have a branch in Egypt. Mr. Raeburn was on strong ground, therefore, when he said that the lex loci contractus in this case, if you take the freight engagement note as the governing document, is Egypt; but I am not certain, again, that the freight engagement note is in any sense the dominating document. After all, as Mr. Davies pointed out, there is not a word in the freight engagement note about distance freight. There is no suggestion in that document of any nationality of any particular ship, and in order to get

the actual contract of carriage—which must be the document upon which the plaintiffs depend—we have to look at the bill of lading. Now the bill of lading, from many points of view, is what I may call a non-committal document. It might support a good many points of view standing alone. It is in the form of the General Produce, Black Sea, Azoff and Danube Steamer Bill of Lading, 1890. It is couched entirely in the English language. It contains all the well known English bill of lading exceptions, and it even has in the margin a reference to war risks, in which His Majesty's Government is named. Against that, it is on the form of Messrs. J. P. Mitchell & Polnauer, who state on the bill of lading that their head office is in Alexandria, and that their branches are respectively in Port Said, Port Sudan, and Khartoum. Finally, the bill of lading states that the delivery is to be in London, and that freight is to be paid on delivery. No one, I think, looking at that bill of lading, could say it was not a perfectly good English bill of lading in the ordinary English form, such as would be employed between two English parties, if they desired to contract for an ordinary carriage of goods by sea. The steamer named in the bill of lading is the *Adriatic*, and Mr. Bucknill took the point that that might also be an English ship. However, I am not much impressed by that, because the name is no doubt an equally good Swedish name, and I cannot think that there is any particular nationality in a proper name.

Those are the three documents, and it is upon the transaction which those three documents evidence that I have to determine what the law is which should apply to the question in issue. As being the nearest case on the facts to the present case, Mr. Bucknill cited *A/B August Freuchen* v. *Hansen* (1), decided by Greer L.J., then a judge of first instance, in the year 1919. I think Mr. Bucknill was right in saying that it is perhaps the nearest on the facts to the present case of any of those which have been cited at the Bar. The facts quite shortly were that the steamer, which was Norwegian, had been delayed—to use a neutral

(1) 1 Ll. L. R. 393.

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term—in sailing from an English port during the war, and the judge was asked to determine, as a matter of law, what law in that case applied. The charter was not the matter in issue—it was the Baltic and White Sea Conference Coal Charter—and the case was not complicated by a bill of lading and a freight engagement note, as in the present case. I need scarcely say that I should not differ, except with the greatest possible diffidence, from any pronouncement of Greer L.J. in any matter of law, and particularly in a matter of this class in which he is an acknowledged master. But his judgment in this case seems to proceed largely upon what has been called, as a compendious form of expression, the argument of uniformity. He takes this charter—the White Sea charter—and he says that he finds there all the old familiar friends of an English charter, and, because the charter is in what we may call the old English form, he says that the parties must have intended to apply English law for the determination of their disputes. Now Greer L.J. is not lacking in high authority for that proposition. He is not the first person who has seen the force of those contentions, and he only restates them with his usual lucidity and force. But even sanctified as it is by high authority I must say that, for my own part, I have some doubts as to the value of this argument based upon uniformity. I cannot shut my eyes to my own personal experience in the formation of some of these agreed documents, and I will take, for example, the Hague Rules, in the formation of which I had some personal part. If two Italians were told that because they agreed that the Hague Rules should be framed in English and French they therefore agreed that either the English or the French law should apply to the determination of any disputes between them, they would not only be surprised, but they would express their dissent with their usual vehemence and vigour. Therefore, although I see the great advantages of interpreting documents in the English language by English law, I am not to be taken as following the decision of Greer L.J. upon that ground alone. Another basis upon which the learned judge proceeded is that in the particular case which

he was deciding the question which arose for decision was a question of the behaviour of the parties at the port of loading. I see some inconveniences in allocating the law to the particular branch or portion of the voyage which happens to be in question. It seems difficult to imagine that there could be one law applicable if the point in dispute concerned a question arising at the port of loading, another law applicable if the matter concerned the conduct of the master during the voyage, and a third law applicable if it concerned a question at the port of delivery. It only needs, I think, an examination of just this one case to show into what ramifications these arguments can extend, and how difficult the matter becomes if one attempts to solve it along one line only. I think it is necessary and right in this class of case to take the broadest possible view and although, as I say, I am not personally impressed with the uniformity argument, I am impressed with the argument of convenience. It is, perhaps, unwise to attempt to generalize at all upon the actions or intentions of any class of the community, particularly that hard-headed person, the business man, but I think one cannot be going far wrong in saying that if one wants to divine the intentions of two business men one may take it that they intended to do what was most convenient.

I will try to review this case for a moment in the light of that consideration. One cannot, I think, shut one's eyes to the fact that the British position in Egypt has been, for many years, predominant. We find, therefore, in this case a British firm, Messrs. Behrend & Co., Ld., arranging for the shipment of a consignment of goods from Egypt. They do their business in English with, it is true, an Egyptian firm, but an Egyptian firm with no particularly Egyptian stamp about them. One could hardly say that the names of Mitchell and Polnauer would convey to any Englishman that he was doing business with people who were distinctively Egyptian, and in fact we know that they were in reality a Scot and a Hungarian. At the moment when they did this business it is not suggested, and it is not a condition of the

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contract, that the goods should be shipped by any ship of any particular nationality. The matter is left completely open; the British firm merely stipulated for the bill of lading in a certain form known to them, under which they would know the full extent of their liability, and a bill of lading which would enable them to cover their operations by appropriate insurance. If one views the matter in that broad and general light, it seems to me that the most convenient thing for all parties would be that the law of England should apply. The shipment is made to England; the bill of lading to the knowledge of both parties provides that the delivery shall be in England and the payment of freight shall be in England; and, if there is any dispute at the end of the journey, everybody knows that the Courts of England will be open and ready to deal with that dispute, and will be equipped to deal with that dispute, in that all the documents concerned in the case are documents in the English language. I am not sure that it is a relevant consideration, but I think it is worth mentioning, that the plaintiffs sought a British Court and not any other Court. If their case had first been launched in Alexandria, I think there would be a good deal more to be said for the point that somebody thought that Egyptian law applied. But no, they come and bring their case in an English Court. Again, I hope I am not doing the plaintiffs an injustice when I say that even now they cannot tell me with any certainty which law they say the parties intended to apply. They have put their case upon the alternatives of the law of the flag, i.e. the law of the Swedish ship, or the law of the place of the contract—Egypt. It seems to me a weakness in their case that they should come and say to me: "We cannot tell what law is intended to apply, but we can say that it was one or other of two laws." The defendants speak with no uncertain voice; they say: "There is no question of alternative laws, the law which we say the parties intended to apply was our law. We were shipping on an English form of bill of lading; we were dealing with parties who knew we were English; we were shipping to England where we should have to pay the

freight, and we say that the law you have to infer from that is the English law."

As I say, I deal with this matter with considerable diffidence, because I am not at all insensible to the powerful arguments which have been addressed to me as to the difficulty of rebutting the presumptions which Sir Robert Aske and Mr. Raeburn so clearly stated. But there is no doubt that those presumptions can be rebutted, and in many cases they have been rebutted, by the evidence. An amusing instance of the difficulty of getting precise authorities in this class of case was afforded by the citation, on the one hand by Mr. Bucknill, of *The Wilhelm Schmidt* (1)—a decision of Sir Robert Phillimore—which was immediately countered by the citation by Mr. Raeburn of *The Express* (2), decided a year afterwards, which, on almost identical facts, presented an almost reverse result. Therefore, it seems to me that the only possible way on which one can proceed is to try to take a fair and broad view of all the circumstances of the contract. At the back of my mind I have always kept the fact of this charterparty because that, after all, is the document upon which the real beneficiaries—the shipowners—depend. But I think I should have come to the same conclusion if the charterparty had not entered into the matter at all.

I think that one has to concentrate one's mind upon what could fairly be said to be the convenient thing to the plaintiffs and the defendants at the moment when they made this contract, and for the reasons I have given I am impressed with the fact that the convenient thing would have been to consider that the dispute should be regulated by the English law. Lord Halsbury L.C., in *In re Missouri Steamship Co.* (3), in the course of the argument makes this observation: "All the cases go on the footing that what law is to govern depends on a variety of circumstances. Among these we must consider the place which the parties must be supposed to have regarded as the place where a remedy for a breach of the contract would be sought." The first part of that dictum

(1) 1 Asp. M. L. C. 82. (2) L. R. 3 A. & E. 597.

(3) 42 Ch.D. 321, 333.

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is the foundation really for the judgment in all these cases. The second part is, perhaps, some small authority for saying that it is not altogether irrelevant to look at the place where the parties did seek a remedy in the particular instance. The only other passage in the authorities which I think it is useful to cite in support of the view I have taken is the judgment of Lord Esher M.R. in *The Industrie* (1): "What is the true inference? In order to see that, you must make up your mind what must have been the intention of the parties. You cannot look into the minds of these people; but when you have two men of business dealing in that way, under such circumstances, with a contract made in London, between English brokers and an English firm, who are not supposed to know German law, but who are supposed to know English mercantile law; with a contract made upon an English form, and on a printed form in common use; with a contract made with nothing but English phrases in it, and with a contract made with phrases peculiar to English contracts, what inference can be drawn but that these two people must have meant that this contract was to be construed according to English law? All the circumstances together show that the intention was to make an English contract, and that is all we want." That is a complete authority, if any authority were needed, for the proposition that you have to look at all the circumstances, and that if they show to the mind of the Court that the English law was intended, the presumptions of the law of the flag or the lex loci contractus are displaced. While accepting, therefore, to the full the statement of the presumptions which has been made on behalf of the plaintiffs, I think that the evidence here is sufficient to show that the parties intended that the English law should apply. It is admitted that on this finding the action must be dismissed with costs.

Solicitors for plaintiffs: *Ince, Roscoe, Wilson & Glover.*
Solicitors for defendants: *Parker, Garrett & Co.*

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vicious, pastured in common, **2**, 240, *257.*

PROBLEM No. 5.

Does a declaration in a will that an heir or next of kin shall take nothing, or shall have the provision made for him and no more, exclude him from participation in property as to which there is an intestacy?

Answered by reference to:—

INTESTACY,
will, excluding persons entitled under, what words sufficient, **44**, 183, *113-116.*

PROBLEM No. 6.

In an action for tort against wrong-doer is the non-joinder of others, who might also have been sued, a defence?

Answered by reference to:—

TORTFEASOR,
joint tortfeasors action against, concerted action, necessity for, **42**, 976, *72.*

TORT,
joint tortfeasors, by. *See* TORTFEASOR.

PARTIES TO PROCEEDINGS,
joinder of. *See* JOINDER OF PARTIES.

JOINDER OF PARTIES,
tort, in action of, joint liability, **36**, 73, *475-477.*

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